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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 793

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,

Appellant,

vs.

STATE OF ILLINOIS, ILLINOIS COMMERCE COMMISSION, and MILWAUKEE ROAD COMMUTERS' ASSOCIATION,

Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

JURISDICTIONAL STATEMENT.

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IN THE

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OCTOBER TERM, 1958.

No.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,

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vs.

STATE OF ILLINOIS, ILLINOIS COMMERCE COMMISSION, and MILWAUKEE ROAD COMMUTERS' ASSOCIATION,

Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

---

JURISDICTIONAL STATEMENT.

The Chicago, Milwaukee, St. Paul and Pacific Railroad Company, appellant, submits herewith its jurisdictional statement showing that this Court has jurisdiction on appeal from the order entered by the District Court for the Northern District of Illinois, Eastern Division, on December 24, 1958, and that substantial questions are presented by the appeal.

I. Reference to Previous Decisions in this Cause.

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, pursuant to which the order here appealed from was entered, is reported at

State v. *United States*, 168 F. Supp. 706 (D.C. N.D., Ill. 1958)

and is appended hereto as Appendix A, at pages 1a-5a, hereof. The said order here appealed from is set forth herein as Appendix B, pages 6a-7a, hereof.

The Interstate Commerce Commission has entered two Reports in this cause which are reported as follows:

Chicago Intrastate Suburban Fares of Milwaukee Road, 297 I.C.C. 353 (1955);
idem, Docket No. 31742, decided October 31, 1958, ... I.C.C. .....

The latter decision is not yet reported and is set forth in Appendix C, at pages 8a-22a, hereof.

The Three-Judge District Court entered an opinion upon review of the first order of the Interstate Commerce Commission which is reported at

State of Illinois v. *United States*, 146 F.Supp. 195 (D.C.N.D. Ill. 1956).

On direct appeal from the decree of the District Court, entered pursuant to such opinion, this Court entered an opinion reported at

Chicago, M., St. P. & P. R. Co. v. *Illinois*, 355 U.S. 300, 78 S. Ct. 304, 2 L.Ed. 2d 292 (1958).

The decision of this Court on the application of this appellant for a stay or supersedeas is reported at

Chicago, M., St. P. & P.R. Co. v. *Illinois*, 356 U.S. 906, 78 S.Ct. 665, 2 L.Ed. 2d 573 (1958).

II. JURISDICTION.

This action was brought under 28 U.S.C., Section 1336, by the State of Illinois, Illinois Commerce Commission, and Milwaukee Road Commuters' Association to set aside

and enjoin enforcement of an order of the Interstate Commerce Commission which prescribed increased suburban fares for appellant. The duly appointed Three-Judge District Court entered its decree setting aside such order on June 14, 1956, and this appellant took a direct appeal therefrom to this Court. On June 18, 1956, an order was entered which provided that, pending such appeal, the appellant should continue to collect and impound certain suburban passenger fares and that the same should be refunded to the persons who paid them in the event the decree of the District Court should be affirmed. Said order also provided that reasonable expenses of the plaintiffs (including attorneys' fees) should be reimbursed to them from any amount remaining unclaimed after such refunding. This order is set out in Appendix D hereto, pages 23a-25a, hereof.

On September 12, 1958, such refunding having been completed, the appellant moved the District Court for distribution to it of the total fund which then remained unclaimed. The District Court denied this motion by order entered December 24, 1958.

Notice of appeal was filed January 23, 1959, in the District Court of the United States for the Northern District of Illinois, Eastern Division. Jurisdiction of this Court is conferred by 28 U.S.C., Sections 1253 and 2101(b). The following cases sustain the jurisdiction of this Court to review the District Court's order of December 24, 1958, on direct appeal:

Arkadelphia Co. v. *St. Louis S. W. Ry. Co.*, 249 U.S. 134, 39 S.Ct. 237, 63 L.Ed. 517 (1919);

B. & O. R. Co. v. *United States*, 279 U.S. 781, 49 S.Ct. 492, 73 L.Ed. 954 (1929);

Atlantic Coast Line v. *Florida*, 295 U.S. 301, 55 S.Ct. 713, 79 L.Ed. 1451 (1935);
Inland Steel Co. v. *U.S.*, 306 U.S. 153, 59 S.Ct. 415, 83 L.Ed. 557 (1939);
United States v. *Morgan*, 307 U.S. 183, 59 S.Ct. 795, 83 L.Ed. 1211 (1939).

III. QUESTIONS PRESENTED.

1. Whether the Three-Judge District Court erred in denying appellant's motion for distribution to it of certain impounded excess intrastate suburban fares which were:

(a) collected pursuant to an order of the Interstate Commerce Commission;

(b) impounded pursuant to an order of the District Court pending the first appeal of this cause to this Court; and which

(c) remain unclaimed after refunds of such excess fares have been made to those of appellant's patrons who presented valid claims therefor;

after which the Interstate Commerce Commission corrected the procedural defects in its first order and entered a valid second order which, like the first, prescribed an increase in appellant's intrastate suburban passenger fares.

2. Whether appellees' expenses, including attorneys' fees, may be taxed against such unclaimed, impounded excess fares.

3. Whether appellee, Milwaukee Road Commuters' Association, may resort to such unclaimed, impounded excess fares for payment of its attorneys' fees when the State of Illinois and Illinois Commerce Commission were parties plaintiff to all phases of the litigation of this cause and competently and effectively represented all suburban riders.

4. Whether the order of the Three-Judge District Court entered on June 18, 1956, under which such fares were collected and impounded was a final and favorable determination of the right of appellees to receive payment from the unclaimed balance of impounded excess fares in respect of their expenses and attorney' fees.

IV. STATEMENT OF THE CASE.

On November 21, 1955, the Interstate Commerce Commission found appellant's Illinois intrastate suburban passenger fares to be noncompensatory and to result in unlawful discrimination against interstate commerce under Sec. 13(4) of the Interstate Commerce Act, 49 U.S.C., Sec. 13(4). *Chicago Intrastate Suburban Fares of Milwaukee Road,* 297 I.C.C. 353 (1955) Upon the refusal of the Illinois Commerce Commission to permit an increase in such fares, the Interstate Commerce Commission, on March 2, 1956, ordered appellant to publish fares approximately 21 per cent higher than the fares which had been approved by the State.

This action was brought by the State of Illinois, Illinois Commerce Commission and Milwaukee Road Commuters Association to set aside the Commission's said order. A temporary restraining order was denied plaintiffs by the District Court on April 18, 1956, on condition that appellant, pending final determination of the proceeding, impound and hold in a separate fund the difference between the fares that became effective April 20, 1956, and those previously in effect. In *State of Illinois* v. *United States,* 146 F. Supp. 195 (D.C., N.D. Ill. 1956), the Three-Judge United States District Court set aside the Commission's order for (1) lack of a finding as to the amount which the intrastate suburban passenger traffic should contribute as its fair share of the system earnings; (2) in-

sufficiency of evidence to support the finding that the prescribed fares would be just and reasonable; and (3) lack of power or jurisdiction by the Commission to alter intrastate fares until the State Commission had first been afforded an opportunity to consider the same evidence and fix the fares on the same basis as presented to the Interstate Commerce Commission. The decree remanded the cause to the Interstate Commerce Commission for further proceedings not inconsistent with the District Court's opinion. It also enjoined compliance by appellant with the order of that Commission and required the immediate refund of the amount of the increase of such fares to the persons from whom collected.

Defendant filed its notice of appeal from this order, and the Three-Judge District Court entered an order on June 18, 1956, which stayed its decree on the condition that appellant, upon collection of such excess fares, continue to impound and hold them in such separate fund pending the disposition of the cause on appeal to this Court. This order provided that, in the event the decree of the District Court should be affirmed by this Court on appeal, the impounded excess fares should be refunded to those who paid them and appellees' reasonable expenses, including reasonable attorneys' fees, should be paid them from any unclaimed balance of the impounded excess fares.

In *Chicago, M., St.P. & P. R. Co.* v. *Illinois,* 355 U.S. 300, 78 S.Ct. 304, 2 L.Ed. 2d 292 (1958), this Court held the Commission's order defective for lack of findings taking the deficit from the intrastate suburban service into account in the light of revenue produced by other intrastate freight and passenger traffic in Illinois. At 355 U.S. 312, 2 L.Ed. 2d 301, the decree of the District Court was:

". . . modified to provide that the remand to the ICC shall be for further proceedings not inconsistent with this opinion."

On February 10, 1958, appellant moved the lower court for a further stay of the decree of June 14, 1956, and an order directing the continued impounding of excess fares, pending the further proceedings on remand to the Interstate Commerce Commission.

On February 28, 1958, this motion was denied and the Three-Judge Court, orally from the bench, instructed appellant to forthwith begin refunding the excess fares. On March 3, 1958, appellant filed a notice of appeal from this order and a motion for a stay or supersedeas pending such appeal. The District Court denied the motion without opinion. Appellant thereupon made application to this Court for a stay or supersedeas; it was denied in *Chicago, M., St. P. & P. R. Co.* v. *Illinois*, 356 U. S. 906, 78 S.Ct. 665, 2 L.Ed. 2d 573 (1958), four Justices dissenting.

On the denial of this application appellant immediately commenced to refund the excess fares to the persons from whom collected, pursuant to the order of June 18, 1956. A "Report on Refunding of Excess Fares" was filed in this cause and approved by the District Court on September 12, 1958. It indicated that on August 28, 1958, the date as of which appellant was ordered to report to the District Court regarding the progress of such refunding, there remained unclaimed by the persons from whom collected the amount of $229,565.51.

Also on September 12, 1958, appellant filed a motion in the District Court seeking distribution to it of the whole amount of the unclaimed excess fares. Briefs were submitted and on December 19, the Three-Judge District Court entered its opinion denying such motion. *State* v.

United States, 168 F. Supp. 706 (D.C., N.D. Ill. 1958). Pursuant thereto the lower court, on December 24, 1958, entered the order here appealed from. Such order denied appellant's motion, granted leave to plaintiffs to file their petitions for an allowance of expenses and attorneys' fees to be taxed against such unclaimed excess fares and provided that the amount remaining after such allowances should be paid to appellant under the doctrine of *Atlantic Coast Line* v. *Florida,* 295 U.S. 301, 55 S.Ct. 713, 79 L.Ed. 1451 (1935).

On January 23, 1959, the appellant filed with the District Court its Notice of Appeal to this Court. On the same date it also filed a notice of appeal to the United States Court of Appeals for the Seventh Circuit. Both appeals are from the order last above-said. Both raise identical questions. The appellant will submit to the Court of Appeals a motion seeking continuance of that appeal, pending a decision by this Court as to whether it has jurisdiction to hear this appeal.

V. THE QUESTIONS ARE SUBSTANTIAL.

1. The Court below ruled that appellant is not entitled to receive all unclaimed impounded excess fares, collected pursuant to an order of the Interstate Commerce Commission, notwithstanding that the Commission entered a second order correcting the procedural infirmities of its first order and again prescribing an increase in appellant's intrastate suburban fares. Such action of the lower court is contrary to this Court's decisions in *Atlantic Coast Line* v. *Florida,* 295 U.S. 301, 55 S.Ct. 713, 79 L.Ed. 1451 (1935); *Inland Steel Co.* v. *U.S.,* 306 U.S. 153, 59 S.Ct. 415, 83 L.Ed. 557 (1939); and *United States* v. *Morgan,* 307 U.S. 183, 59 S.Ct. 795, 83 L.Ed. 1211 (1939).

As stated in the *Morgan* decision just quoted, at 307 U.S. 191, 83 L.Ed. 1217:

> ". . . in exerting its extraordinary powers to stay execution of a rate order, and in directing payment into court of so much of the rate as has been found administratively to be excessive, it assumes the duty of making disposition of the fund in conformity to equitable principles."

If the equitable principles there referred to have meaning at all, they indicate that, since the first order of the Commission was adjudged invalid only because of a procedural omission, appellant possesses an equitable right to retain the unclaimed excess fares collected under an otherwise proper order of the Commission, which right was affirmed by the Commission's second order.

2. Another substantial question is whether the ground of this Court's decision in *Chicago, M., St. P. & P. R. Co.* v. *Illinois,* 355 U.S. 300, 78 S.Ct. 304, 2 L.Ed. 2d 292 (1958), was procedural or substantive in nature. If procedural within the purview of the *Atlantic Coast Line* and *Morgan* cases, the Commission's second order of October 31, 1958, Appendix C hereof, affirming its earlier finding that the fares were discriminatory, necessarily conferred upon appellant, under the cited decisions, the right to retain the unclaimed impounded fares.

3. A further substantial question raised on this appeal is the effect of the agreed order of June 18, 1956. The decree of the Three-Judge Court entered on June 14, 1956, provided that appellant's suburban passenger fares should revert immediately to the prior lower level. Pending the appeal from the District Court to this Court from such decree, appellant was permitted to continue collecting the increased fares on the express condition that such

fares be refunded in the event the decree was affirmed. Appellant agreed to this order so that the excess fares which might have been collected in the interim should not be irretrievably lost to it in the event this Court reversed the decree. As Mr. Justice Frankfurter stated, with the concurrence of Justices Burton, Harlan and Whittaker, in the dissent from the decision of the majority of this Court which denied appellant's application for a stay or supersedeas, *Chicago, M., St. P. & P. R. Co.* v. *Illinois*, 356 U.S. 906, at 908-909, 78 S.Ct. 665, 2 L.Ed. 2d 573, at 576 (1958):

> "In the first place, it is not at all clear that by their agreement the parties contemplated distribution of the fund in the circumstances that in fact came to pass. Although as a verbal matter it is arguable that the judgment of the District Court was 'affirmed,' our judgment was based on grounds substantially different from those of the District Court. The judgment of this Court by no means finally determined the legality of the intrastate fares. It looked to further proceedings before the Commission that may well result in a valid order finding the fares discriminatory. Moreover, petitioner could not, by its agreement, bargain away the rights of the public, or relieve the court from its obligation to frame a decree that would implement the policy of the Federal Act protecting the revenues of interstate carriers. No more can such an agreement relieve this Court of its duty to do substantial justice, insofar as that is within the power of a court, between the contending interests in the litigation."

Thus the question is raised whether appellant's agreement to the order of June 18, 1956, foreclosed its right to receive the whole of the unclaimed impounded fund, despite the subsequent entry of the Commission's second order of October 31, 1958.

4. A substantial question is presented whether the Three-Judge District Court, although recognizing the doctrines of the *Atlantic Coast Line* and *Morgan* cases relative to the impounded funds which will remain after the taxation of expenses and attorneys' fees, erred in refusing to acknowledge that those rulings apply to the whole of such fund prior to any such taxation. Those decisions apply to the whole fund, and the District Court, having recognized them, erred in denying appellant's motion for distribution to it of the total unclaimed impounded fund.

5. Still another substantial question raised here is whether the law sanctions the taxation of appellees' expenses and attorneys' fees against the fund now in the custody of the District Court. Appellant would not deny that such an allowance is entirely proper when the circumstances presented are such as those in *Trustees* v. *Greenough*, 105 U.S. 527, 26 L.Ed. 1157 (1882), and *Sprague* v. *Ticonic Bank*, 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed. 1184 (1939), but those decisions turned on the theory that the persons who benefited from the attorneys' services should each contribute their proportionate share of the cost of such services from their respective portions of the fund. The equitable principle involved was that of quasi contract, unjust enrichment.

That principle cannot be applied in the instant case. The effect of the lower court's order is to tax appellees' expenses and attorneys' fees against what remains of a fund which already has been distributed irrevocably to the fullest possible extent. Those who received a refund through counsels' services will not be required to contribute their respective shares of the expenses and attorneys' fees incurred by appellees. Such facts do not resemble the *Greenough* and *Sprague* cases. Since the Three-Judge District Court has recognized that appellant is entitled to

receive the balance of the presently unclaimed fund after allowance of appellees' expenses, appellant, and not those who benefited from counsels' services, will be required to pay appellees' expenses and attorneys' fees.

VI. CONCLUSION.

The questions presented by this appeal are substantial in that the authority of several decisions of this Court are threatened by the contrary decision and orders of the lower court. This Court should accord plenary consideration to the questions raised by this appeal, with briefs on the merits and oral arguments for their resolution. Probable jurisdiction should be noted.

Respectfully submitted,

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Chicago, Milwaukee, St. Paul
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Chicago 6, Illinois
March 23, 1959

APPENDIX A.

IN THE

DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois
Eastern Division

State of Illinois, Illinois Commerce Commission, and Milwaukee Road Commuters' Association, Plaintiffs, v. United States of America, Interstate Commerce Commission, and Chicago, Milwaukee, St. Paul & Pacific Railroad Company, Defendants.	No. 56 C 681

MEMORANDUM.

Before ELMER J. SCHNACKENBERG, Circuit Judge, and PHILIP L. SULLIVAN and WALTER J. LABUY, District Judges.

SCHNACKENBERG, Circuit Judge. On September 12, 1958, defendant Chicago, Milwaukee, St. Paul & Pacific Railroad Company, a corporation, hereinafter called the Milwaukee Road, filed its motion for distribution to itself, for its own general use, the total amount of excess fares now remaining unclaimed by, and unrefunded to, the persons from whom collected, now amounting (it is said) to the sum of $229,565.51; and Milwaukee Road Commuters' Association, one of the plaintiffs herein, has filed an answer to said motion, denying that the Milwaukee Road is entitled to the balance now in said fund and asserting that the Milwaukee Road should be required to deposit the balance of said fund with the clerk of this court to be used to pay to plain-

tiffs their reasonable expenses incurred in connection with this litigation.

Provision for the establishment of the fund in question was made by this court's order of June 18, 1956, which provides:

> "This cause coming on to be heard on motion of Chicago, Milwaukee, St. Paul & Pacific Railroad Company (herein referred to as 'the Milwaukee Road') one of the defendants herein, for the entry of an order staying the injunction prescribed by decree of this court entered June 14, 1956, pending the hearing of said cause on appeal before the Supreme Court of the United States, it appearing to the court that due and proper notice of the time and place for presentation of said motion has been served on all the attorneys of record and it further appearing to the court that Notice of Appeal from the decree entered by this Court on June 14, 1956, has been duly served and filed and the Court being fully advised in the premises,
>
> "It Is Ordered:
>
> "1. The injunction prescribed by decree of this Court entered June 14, 1956, is stayed pending disposition of the appeal from that decree, heretofore taken to the Supreme Court of United States, and subject to the conditions below set forth.
>
> "2. The excess fares collected by the Milwaukee Road after April 20, 1956, pursuant to order of the Interstate Commerce Commission set aside by the decree, shall be impounded and held by the Milwaukee Road in a separate fund so that in the event the decree is affirmed, or the appeal therefrom is dismissed or discontinued, the excess fares may be refunded to the persons who paid them. The Milwaukee Road shall issue suitable coupons or other evidence to such persons showing their payment of the excess fares.

"3. If the decree is reversed and injunction dissolved, the Milwaukee Road shall retain the impounded excess fares and may transfer them to its general funds.

"4. If the decree is affirmed or the appeal is dismissed or discontinued, the Milwaukee Road shall post immediately in its suburban stations, notice that refund will be made of the excess fares to the persons who have paid them.

"5. Six months after the posting of such notice, the Milwaukee Road shall file a report in this court setting forth the total amount of the excess fares impounded, the total amount of refunds made therefrom, and the balance of the impounded excess fares then unclaimed. At the same time, the Milwaukee Road shall deposit with the Clerk of this Court the amount of such unclaimed balance.

"6. Thereupon, upon petition of plaintiffs, and evidence showing reasonable expenses (including reasonable attorneys' fees) incurred by each of the plaintiffs in the proceeding before the Interstate Commerce Commission, reviewed in this case, in prosecuting this case in this Court, and in connection with the appeal from the decree herein, the Court shall order that the amount of said reasonable expenses shall be paid to plaintiffs from the unclaimed balance of the impounded excess fares. Any remaining balance shall be retained by the Clerk subject to such disposition as this Court may direct.

"7. The Court retains jurisdiction of this case to enter such further orders as may be required to carry this order into effect."

According to the records of this court, the balance of said fund, in the sum of $229,565.51, was paid to the clerk of this court on September 16, 1958, and is now on deposit in a Chicago bank.

The order of June 18, 1956, is an agreed order and was entered upon motion of the Milwaukee Road.[1] No appeal has been taken from that order and, of course, no appeal could have been taken therefrom.

Exhaustive briefs have been filed and considered by this court.

The agreed order of June 18, 1956, was a final and favorable determination of the right of plaintiffs to receive payment from the unclaimed balance of impounded excess fares covering their reasonable expenses (including reasonable attorneys' fees) incurred by each of them as referred to in said order. The only reservation of jurisdiction in regard thereto was for the purpose of entering such further orders as may be required to carry that order into effect. However, in order that plaintiffs may take advantage of the provisions of that order in this respect, they must petition this court and submit evidence showing reasonable expenses incurred by each of them and the

---

[1] Before this court on February 28, 1958, the following colloquy occurred:

"Judge Schnackenberg. ** * We entered an order on June 18, 1956, providing for the impounding of money constituting the excess, alleged excess, fares to be paid by persons using the Milwaukee Road in suburban service. Was there any objection entered to the entry of that order, or was it an agreed order?

Mr. Guthrie: There was no objection. It was an agreed order, your Honor.

Judge Schnackenberg: Is that right, counsel?

Mr. Eckersall: That is right, your Honor.

Judge Schnackenberg: 'That is correct'. Mr. Eckersall answered for the railroad.

Mr. Eckersall: Your Honor, as I recall, counsel for plaintiff prepared the order. We had prepared one form of order, and they prepared the form that was entered.

Judge Schnackenberg: The order was entered upon the motion of counsel for the railroad.

Mr. Eckersall: That is correct, sir. * * *"

amount. For that reason, counsel for plaintiffs are directed to prepare and, after due notice, submit to this court for entry, an order granting plaintiffs leave to file within ten days thereafter, a petition or petitions, together with proper affidavits showing in detail the reasonable expenses (including reasonable attorneys' fees) incurred by each of them, and which order shall give leave to defendants, or either of them, to file within ten days after the filing of each said petition, an answer to said petition, together with such counter-affidavits as defendants may deem necessary.

The said order shall provide further that this court reserves jurisdiction to finally adjudicate upon said petition or petitions and to dispose of said entire fund.

As to any balance remaining in said fund after it has been reduced by the payment of any such reasonable expenses (including reasonable attorneys' fees) as aforesaid, we hold that said balance shall be paid to the Milwaukee Road (*Atlantic Coast Line Railroad Co.* v. *State of Florida,* 295 U.S. 301, 55 S.Ct. 713, 79 L.Ed. 1451). Provision, therefore, shall be included in the order which we have hereinabove directed counsel for plaintiffs to submit to this court.

APPENDIX B.

IN THE

DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois
Eastern Division

State of Illinois, Illinois Commerce Commission, and Milwaukee Road Commuters' Association, Plaintiffs, v. United States of America, Interstate Commerce Commission, and Chicago, Milwaukee, St. Paul & Pacific Railroad Company, Defendants.	No. 56 C 681

ORDER.

This cause coming on to be heard on motion of Chicago, Milwaukee, St. Paul and Pacific Railroad (herein referred to as "the Milwaukee Road"), one of the defendants herein, for an order permitting distribution to it of the fund of $229,565.51 unclaimed impounded excess fares, and the Court having received briefs of counsel and being fully advised in the premises,

It Is Ordered

1. The motion of the Milwaukee Road for an order permitting distribution to it of the fund of $229,565.51 unclaimed impounded excess fares is denied.

2. Plaintiffs may file with this Court a petition or petitions, together with affidavits showing in detail the reason-

able expenses (including reasonable attorneys' fees) incurred in the proceeding before the Interstate Commerce Commission, reviewed in this case, in prosecuting this case in this Court, and in connection with the appeal from the decree herein. Any such petition shall be filed by January 5, 1959.

3. Defendants, or any of them, may file an answer to any such petition and such counter-affidavits as defendants may deem necessary. Any such answer shall be filed by January 15, 1959.

4. Any balance remaining in such fund after payment of any such reasonable expenses of plaintiffs (including reasonable attorneys' fees) shall be paid to the Milwaukee Road.

5. This Court reserves jurisdiction to adjudicate finally upon said petition or petitions and to dispose of said entire fund.

ENTER :

_____

Circuit Judge

_____

Judge

_____

Judge

Dated: December 24, 1958

APPENDIX C.

[Sh. 1]

INTERSTATE COMMERCE COMMISSION

No. 31742[1]

CHICAGO INTRASTATE SUBURBAN FARES OF MILWAUKEE RAILROAD

Decided October 31, 1958.

Upon further hearing, pursuant to the opinion of the Supreme Court, 355 U.S. 300, found that respondent's intrastate fares within its Chicago, Ill., suburban area result in unjust discrimination against and an undue burden on interstate commerce. Intrastate fares prescribed to remove the unlawfulness. Outstanding orders in No. 11703 modified accordingly. Prior report, 297 I.C.C. 353.

Edwin R. Eckersall, R. K. Merrill, and Joseph J. Nagle for respondent.

H. R. Begley, Latham Castle, and W. J. Sheridan, Jr. for Illinois Commerce Commission.

Francis D. Fisher and S. Ashley Guthrie for protestant Milwaukee Commuters Association.

REPORT OF THE COMMISSION ON FURTHER HEARING BY THE COMMISSION:

This is an investigation, instituted upon petition of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, to determine whether its intrastate fares within its Chicago, Ill., suburban area, embracing points between and including Walworth, Wis., and Elgin, Ill., on

[1] This report embraces also, on further hearing, No. 11703. *Intrastate Rates Within Illinois*, 59 I.C.C. 350.

the one hand, and Chicago Union Station, on the other, made or imposed by the Illinois Commerce Commission, cause any undue or unreasonable advantages, preference, or prejudice as between persons or localities in intrastate commerce, on the one hand, and in interstate commerce, on the other, or any undue, unreasonable, or unjust discrimination against interstate commerce, and to determine what fares, if any, or what maximum or minimum fares, should be prescribed to remove any unlawfulness that may be found to exist. The investigation also includes the question of whether the outstanding orders in No. 11703, *Intrastate Rates Within Illinois*, 59 I.C.C. 350, should be further modified.

*[Sh. 2] *In the prior report, 297 I.C.C. 353, we found that, based on the year 1954, the respondent's suburban operations were operated at an out-of-pocket deficit, excluding return, of $306,038, and required its suburban fares to be increased, under a finding of undue, unreasonable, and unjust discrimination against interstate commerce, to bases estimated to yield about $77,000 per annum above its out-of-pocket costs, as a minimum contribution to its indirect costs and taxes. Our order was enjoined by the District Court for the Northern District of Illinois, Eastern Division, 147 F. Supp. 195, which remanded the case to us for further proceedings not inconsistent with its opinion. On appeal, 355 U.S. 300, the Supreme Court affirmed on the ground that we had made no findings as to the total of the indirect costs and taxes to which the contribution was to be made, and had made no findings which took into account the deficit from the suburban service, "in the light of the carrier's other intrastate revenues from Illinois traffic, freight and passenger." The Supreme Court modified the judgment of the District Court, and the remand to us called for

further proceedings not inconsistent with the Supreme Court's opinion.

Accordingly, we reopened the proceeding for further hearing, which was held in Chicago, Ill., on April 10 and 11, and May 14, 1958. The Illinois Commerce Commission and the Milwaukee Road Commuters Association appeared, cross-examined the respondent's witnesses, and adduced evidence in opposition. By agreement of the parties, the respondent filed an opening brief, the protestants a reply brief, and the respondent a closing brief; and the matter was submitted to us on exceptions, and replies, to the proposed report. Exceptions and requested findings not herein specifically discussed have been considered and found not justified.

*[Sh. 3] *For the year ending October 31, 1957, the latest period available, the total revenue from this service was $1,941,383, from which should be deducted headend revenue of $32,284 and revenue from through passengers of $50,509, resulting in net revenue from suburban revenue passengers of $1,858,590. The out-of-pocket expenses, excluding return, of this operation totaled $2,758,230, from which should be deducted the estimated expense of the headend traffic of $42,616, and a revenue credit for handling nonrevenue nonsuburban passengers of $164,226, resulting in a net out-of-pocket expense of $2,551,388, or an out-of-pocket deficit from the handling of suburban revenue passengers of $692,798. In addition to the out-of-pocket costs, the net indirect costs and taxes assigned to this traffic were $1,184,742, or fully-distributed costs, exclusive of return, of $3,736,130, resulting in a total deficit of $1,877,540.

Protestants criticize the respondent's estimate of the headend expenses because it is less than the 3.2 percent ratio used in its 1954 study, but this is due to the reduced

volume of mail handled on the suburban trains with its concomitant reduction in the number of headend cars. Protestants would also adjust upward the above-mentioned revenue credit to reflect present-day costs, but this credit was based on the level of 1954 fares which are still in effect and were in effect during the study year, so that no upward adjustment is appropriate.

During the 12 months' period ending October 31, 1957, the respondent's total revenue from its Illinois intrastate freight service was $2,637,781, and from its Illinois intrastate passenger service other than suburban it was $84,535. On a fully-distributed basis, exclusive of return, it incurred a deficit from these operations of approximately $230,158 on freight service and *$56,798 on pas-
*[Sh. 4] senger service other than suburban, or a total of $286,956. This computation is based on the actual revenues from the Illinois intrastate traffic, except for reciprocal and interterminal switching for which no separation between interstate and intrastate traffic was available. On interterminal switching, where the respondent performs the switching in connection with a switching movement of another railroad, all of the revenue was assigned to intrastate traffic, although a small proportion of the total traffic moves in interstate commerce. On the other hand, on reciprocal switching where the respondent performs a switching service in connection with a line-haul movement of another railroad, all of the revenue was assigned to interstate traffic, although a small portion of the total traffic moves in intrastate commerce. The line-haul expenses were generally apportioned between interstate and intrastate on a train-mile, ton-mile, or passenger-mile basis, and the terminal expenses on a per car or per passenger basis.

Protestants contend that the freight expenses should have been apportioned on a revenue basis. This ignores the fact that the expenses are incurred in terms of different services or work units, such as the switching of cars, the handling of ton-miles, etc. They point out also that the respondent's apportionments did not reflect the practice followed in its reports to the Illinois Commission prior to 1957. This relates principally to revenues from switching operations and joint facilities. Prior to 1957, the respondent made no segregation of such revenues between Illinois intrastate and Illinois interstate. Instead, such revenues were all classified for accounting convenience as intrastate. Because it seemed "necessary "[Sh. 5] by reason of the above-mentioned Supreme Court decision, the respondent has undertaken to make such a segregation in this proceeding.

It is contended also by the protestants that the terminal expenses incurred on interstate traffic passing through the State, but with primary origin and ultimate destination outside the State, should be apportioned over the entire length of the haul. There is merit in this contention, but it goes to the relative cost of Illinois interstate and other interstate traffic and not to the propriety of the respondent's apportionments to Illinois intrastate traffic.

In the performance of transportation service, intrastate and interstate revenue traffic are inextricably commingled in the same trains. This applies as well in freight-train service as in passenger-train service. Both characters of traffic are propelled by the same motive power, over the same roadway and track facilities, employing the same signalling devices and station facilities, under the control of a single crew operating under a single set of orders or centralized train control. The commingling of the traffic

in through passenger-train service is brought about by the further fact that intrastate passengers utilize the same cars as interstate passengers. Mail, express, and other so-called headend traffic utilize the same cars for both intrastate and interstate traffic.

The apportionments to the Illinois intrastate traffic were made by the respondent's chief statistician, who has had 36 years' experience in the railroad accounting field. These apportionments present a problem of unusual difficulty, and must needs rest in part upon uncertain bases. They may be accepted as rough approximations only.

This is not fatal for the *respondent, however, *[Sh. 6] especially in view of the fact that the Transportation Act of 1958 specifically provides that we may exercise our power under section 13, "without a separation of interstate and intrastate property, revenues, and expenses, and without considering in totality the operations or results thereof of any carrier, or group of carriers wholly within any State."

The protestants show that according to its report to the Illinois Commission, the respondent incurred a deficit in 1957 in net railway operating income from its system passenger operations of $20.2 million, or 2.94 cents a passenger-mile; from its Illinois passenger-train operations, other than suburban, a deficit of $3.5 million, or 3.42 cents a passenger-mile; and from its suburban operations, during the 12 months ending October 31, 1957, the unadjusted deficit was $2 million, or 1.68 cents a passenger-mile. Stress is laid upon the relative deficits per passenger-mile. However, the operating ratios, which reflect the ratio of revenues to expenses, are more significant. Based on protestants showing, these were 168 percent on the respondent's entire passenger traffic, 177 percent on its

Illinois passenger traffic, other than suburban, and 201 percent on its suburban traffic. The adjusted operating ratio on the latter was 185 percent It thus appears that the statement at page 359 of the prior report that "the deficit from the respondent's total passenger operations is relatively greater than from its suburban operations" is no longer true.

The total value of the respondent's property devoted to the transportation service is $1,166,081,150, of which $137,290,917 is devoted to its operations in Illinois and about $9 million to its suburban operations. Its rate of return on net investment in its entire operations in 1957 was only 2.13 percent, as *compared with an average *[Sh. 7] of 3.35 percent for all class I railways of the United States.

To the extent that the respondent's intrastate suburban fares are not producing sufficient earnings to cover the out-of-pocket cost of the service plus a fair share of the respondent's revenue needs; that is, of its indirect costs, taxes, and return on investment, they are discriminatory, revenuewise, against the respondent's interstate traffic as a whole.

The best test of what this suburban traffic can and should reasonably yield above its out-of-pocket costs is derived from a comparison with the suburban fares approved by the Illinois Commission for the Chicago, Rock Island and Pacific Railroad Company, whose operations are also completely dieselized and appear to be substantially similar to those of the respondent. The fares of the Rock Island are neither the lowest nor the highest in the Chicago suburban area. At the present time, the respondent's fares are the lowest in the area, being substantially lower than even the local fares of the Chicago Transit

Authority. Fares on the Rock Island level, modified to reflect a 25-cent minimum fare and holddowns on commutation fares to more distant points, would produce an increase in revenue to the respondent of approximately $798,170 a year, or 42 percent, resulting in a contribution of only $105,372, or about 9 percent, to the indirect costs and taxes properly allocable to this traffic. In the light of the rapid growth and population in the respondent's suburban territory and the steady increase in its patronage since 1940, little or no loss of traffic would result from an increase to the modified Rock Island level reflected in our findings herein.

We have recognized in general freight rate in-
[Sh. 8] crease proceedings, at least since Ex Parte No. 103, *Fifteen Percent Case, 1931,* 178 I.C.C. 539, that if the passenger service inevitably and inescapably cannot bear its direct cost and its share of joint or indirect costs, the deficiency may be taken into account in determining the amount of the general increase in freight rates. In other words, we have recognized that such sufficiency, until it can be eliminated, is in a sense a part of the railroads' overhead burden to which the freight service must make some contribution. However, we have also recognized that no segment of the passenger-train service may be excused from contributing the greatest possible earnings consonant with adequate service and reasonable charges, and that the railroads must exercise every legitimate effort to place each segment on a more nearly compensatory basis. See No. 9200, *Railway Mail Pay, Application of Eastern Railroads, 1956,* decided June 23, 1958.

The deficits from the suburban segments of rail passenger-train operations have presented a particularly acute problem since World War II, such segments being

in certain instances both interstate and intrastate, and in other instances principally interstate or intrastate. In numerous proceedings since 1946, we have approved increases in suburban fares so that the traffic contributed all that it reasonably could to *its indirect costs *[Sh. 9] or at least minimized deficits therefrom.[1] Many of these proceedings were handled jointly with State regulatory bodies and included the disposition of issues with respect to intrastate fares under section 13. In two of these proceedings where, as here, we were unable to arrange joint hearings with State regulatory body and had to resort to affirmative orders under section 13, our orders were sustained by the statutory courts, whose actions were affirmed *per curiam* by the Supreme Court. *New York State Commutation Fares, New Haven Railroad,* 279 I.C.C. 151, sustained 98 F. Supp. 855, affirmed *per curiam,* 342 U. S. 882; and *Illinois Central Multiple Fares in Chicago Area,* 281 I.C.C. 537, sustained 101 F. Supp. 36, affirmed *per curiam,* 342 U. S. *[Sh. 10] 930. *Here, as in the other suburban-fare proceedings, the respondent's suburban service can-

[1] *Commutation Fares Between New Orleans and Gulf Coast,* 270 I.C.C. 291 (1948); *Jersey Central Commutation Fares,* 273 I.C.C. 693 (1949); *New Jersey-New York Commutation Fares,* 277 I.C.C. 459 (1950); *Commutation Fares Between New Orleans and Mississippi,* 278 I.C.C. 567 (1950); *Commutation Fares, Eastern Railroads,* 278 I.C.C. 491 (1950); *New York Central Commutation Fares, Chicago and Indiana,* 279 I.C.C. 188 (1950); *Commutation Fares Between Chicago and Wisconsin,* 279 I.C.C. 773 (1950); *New York State Commutation Fares, New Haven Railroad,* 279 I.C.C. 151 (1950); *Chicago, South Shore & South Bend Railroad Fares,* 279 I.C.C. 663 (1950); *Commutation Fares, New York, S.&W.R. Co.,* 280 I.C.C. 31 (1951); *Commutation Fares Between D.C., Md., Pa., W. Va.,* 280 I.C.C. 669 (1951); *Illinois Central Multiple Fares in Chicago Area,* 281 I.C.C. 537 (1951), 283 I.C.C. 133 (1953); *Commutation Fares, B.&M. R.R.,* 283 I.C.C. 214 (1951), 286 I.C.C. 494 (1952); *Increased Passenger Fares, C.N.S.&M. Ry. Co.,* 284 I.C.C. 221 (1952); *Commutation Fares in C.F.A. & T.I. Territories,* 284 I.C.C. 129 (1952), 288 I.C.C. 117 (1953); *Commutation and Multiple Fares, Illinois and Wisconsin,* 288 I.C.C. 15 (1953); *Jersey Central Intrastate Commutation Fares,* 288 I.C.C. 47 (1953); *Commutation Fares Between New Orleans and Mississippi Gulf Coast,* 288 I.C.C. 735 (1953); *Fares, C.A.A. S.B. R.R.,* 291 I.C.C. 665 (1954); *New Jersey Commutation Fares,* 293 I.C.C. 562 (1954); *Commutation Fares Between N.Y., N.J., Pa.,* 297 I.C.C. 53 (1955); *Increased Commutation Fares, New Haven Railroad,* 1956, 298 I.C.C. 741; *Illinois Central Suburban Fares,* 300 I.C.C. 53 (1957); *Increased Commutation Fares, N.Y., N.J., Pa.,* 302 I.C.C. 125 (1957).

not be said to be a service which "inevitably and inescapably cannot bear its direct costs and a fair share of its joint or indirect costs," and, in any event, the deficiency therefrom cannot be said to be made up by its other Illinois intrastate operations which are themselves being conducted at a deficit on a fully-distributed basis, exclusive of return. Moreover, it may not be assumed that the respondent's freight traffic, either interstate or intrastate, at least with the increase recently authorized in Ex Parte No. 212, *Increased Freight Rates, 1958,* 302 I.C.C. 665, ... I.C.C. ....., and related State proceedings, is not bearing all that it reasonably can bear above its out-of-pocket costs. Considering the low rate of return of the respondent on its entire operations, the principal effect of the failure of this suburban traffic to do likewise has been and will be to hamper the respondent, *pro tanto,* in performing adequate service in both interstate and intrastate commerce. Whatever adjustments, if any, may or should be made in the respondent's freight rates, the freight shippers should not be called upon to bear a deficiency from this suburban service which can reasonably be borne by the suburban riders.

Upon further hearing, we find:

1. That the respondent's present suburban fares made or imposed by authority of the State of Illinois are abnormally low and do not produce sufficient revenue to cover the out-of-pocket cost of the service nor a fair share of the respondent's revenue needs.

2. That the respondent's suburban fares cause and, unless increased to the extent herein set forth, [Sh. 11] will continue to cause undue, unreasonable, and unjust discrimination against, and an undue burden on, interstate commerce, in violation of section 13(4) of the Interstate Commerce Act.

3. That such undue, unreasonable, and unjust discrimination and undue burden can and should be removed by establishing for such intrastate travel fares no lower than the bases set forth as prescribed in the appendix hereto.

4. That the fares, as so increased, will produce additional revenue of about $798,170 a year, which is the approximate measure of the revenue discrimination against interstate commerce resulting from the respondent's present suburban fares and the additional amount necessary for such fares to make a fair contribution to the respondent's indirect costs and return on investment.

5. That increased fares will be just and reasonable for the future, and are necessary to enable the respondent, under honest, economical, and efficient management, to provide adequate and efficient service at the lowest cost consistent with the furnishing of such service.

6. That the outstanding orders in No. 11703 should be modified accordingly.

An appropriate order will be entered.

FREAS, *Chairman*, concurring:

I did not subscribe to that portion of the original report which prescribed fares higher than those sought. At the further hearing, the respondent submitted as necessary a somewhat higher level of fares than originally prescribed by the majority. The new level is herein found to be justified and I agree.

*[Sh. 12] *COMMISSIONER ARPAIA, being necessarily absent, did not participate in the disposition of this proceeding.

COMMISSIONER WEBB did not participate in the disposition of this proceeding.

*[App. Sh. 1] *APPENDIX

Unrestricted Monthly Computation Fares,
Present and Prescribed

Between Chicago (Union Sta.), Ill., and—	Distance	FARES Present	Prescribed
Western Division	*Miles*		
Hermosa, Ill.	6.1	$ 7.20	$15.00
Cragin, Ill.	7.2	8.40	15.00
Hanson Park, Ill.	7.9	9.60	15.00
Galewood, Ill.	8.8	10.20	15.00
Mars, Ill.	9.3	10.20	15.00
Mont Clare, Ill.	9.7	10.80	15.55
Elmwood Park, Ill.	10.4	10.80	15.60
River Grove, Ill.	11.6	11.80	16.25
Franklin Park, Ill.	13.4	12.30	17.70
Manneheim, Ill.	14.2	12.80	18.40
Bensenville, Ill.	17.4	14.30	20.60
Wooddale, Ill.	19.3	15.20	21.90
Itasca, Ill.	21.2	16.00	23.00
Medinah, Ill.	23.2	16.80	23.70
Roselle, Ill.	24.6	17.60	25.20
Ontarioville, Ill.	28.6	19.20	27.60
Bartlett, Ill.	30.3	19.60	28.50
Spaulding, Ill.	32.9	20.80	29.90
Elgin, Ill.	36.8	22.40	32.05

Northern Division

Healy, Ill.	6.4	$ 7.20	$15.00
Grayland, Ill.	8.2	9.60	15.00
Mayfair, Ill.	9.0	10.20	15.00
Forest Glen, Ill.	10.2	10.80	15.30
Edgebrook, Ill.	11.3	11.30	16.25
Morton Grove, Ill.	14.3	12.80	18.40
Golf, Ill.	16.2	13.80	19.85
Glenview, Ill.	17.4	14.30	20.60
Techny, Ill.	20.3	15.60	22.45
Northbrook, Ill.	20.9	16.00	22.90
Deerfield, Ill.	23.9	17.20	24.90
West Lake Forest, Ill.	28.0	18.80	27.30
Rondout, Ill.	32.3	20.40	29.60
Libertyville, Ill.	35.5	22.00	31.35
Grays Lake, Ill.	41.0	24.00	34.50
Round Lake, Ill.	44.0	25.20	36.30
Long Lake, Ill.	46.0	26.00	37.10
Wilson Road, Ill.	46.7	26.40	37.50
Ingleside, Ill.	47.8	26.80	37.90
Fox Lake, Ill.	49.5	27.60	38.70
Spring Grove, Ill.	53.7	29.20	40.30
Solon Mills, Ill.	55.8	30.00	41.10
Belden, Ill.	59.4	31.60	42.70
Hebron Siding, Ill.	61.8	32.40	43.50

*[App. Sh. 2] **Bases prescribed for other types of fares:*

Subject to a minimum of 25 cents per trip in connection with all types of fares:

Between all points in the suburban area, one-way fares shall be based on 3.6 cents per mile, round-trip fares shall be 180 percent of the one-way fares, and 10-trip fares shall be 5 times the round-trip fares.

Between Chicago Union Station, on the one hand, and all other points in the suburban area, on the other, 25-trip fares shall be 11½ times the round-trip fares, and weekly and 46-trip commutation fares, respectively, shall be 25 and 90 percent of the unrestricted monthly fares, subject to a maxima of 6 and 23 times the round-trip fares.

• • • •

CORRECTED ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 31st day of October, A. D. 1958.

No. 31742

CHICAGO INTRASTATE SUBURBAN FARES OF MILWAUKEE RAILROAD

No. 11703

IN THE MATTER OF INTRASTATE RATES WITHIN STATE OF ILLINOIS

This proceeding having been further heard, and full investigation of the matters and things involved having been made, and the Commission having, on the date hereof, made and filed a report on further hearing containing its findings of fact and conclusions thereon, which report, together with the prior report, 297 I.C.C. 353, is hereby referred to and made a part hereof:

It is ordered, That the respondent herein be, and it is hereby, notified and required to cease and desist, on February 6, 1959, from practicing the undue, unreasonable, and unjust discrimination against and undue burden on interstate commerce found to exist in said report;

It is further ordered, That said respondents be, and it is hereby, notified and required to establish, on February 6, 1959, upon not less than 10 days' notice to this Commission and to the general public by filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain and apply for intrastate travel between points in the respondent's Chicago, Ill., suburban area within the State of Illinois, fares no lower than the bases prescribed in said report;

It is further ordered, That the outstanding orders in No. 11703, be, and they are hereby, modified so as to permit the establishment and maintenance of intrastate fares within said suburban area on the basis so prescribed.

And it is further ordered, That this order shall remain in effect until the further order of the Commission.

By the Commission.

HAROLD D. MCCOY,
Secretary.

(Seal)

APPENDIX D.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

[Title omitted]

ORDER STAYING INJUNCTION, ETC.—June 18, 1956

This cause coming on to be heard on motion of Chicago, Milwaukee, St. Paul and Pacific Railroad Company (herein referred to as "the Milwaukee Road") one of the defendants herein, for the entry of an order staying the injunction prescribed by decree of this court entered June 14, 1956, pending the hearing of said cause on appeal before the Supreme Court of the United States, it appearing to the court that due and proper notice of the time and place for presentation of said motion has been served on all of the attorneys of record and it further appearing to the Court that Notice of Appeal from the decree entered by this Court on June 14, 1956, has been duly served and filed and the Court being fully advised in the premises,

IT IS ORDERED:

1. The injunction prescribed by decree of this Court entered June 14, 1956, is stayed pending disposition of the appeal from that decree, heretofore taken to the Supreme Court of United States, and subject to the conditions below set forth.

2. The excess fares collected by the Milwaukee Road after April 20, 1956, pursuant to order of the Interstate

Commerce Commission set aside by the decree, shall be impounded and held by the Milwaukee Road in a separate fund so that in the event the decree is affirmed, or the appeal therefrom is dismissed or discontinued, the excess fares may be refunded to the persons who paid them. The Milwaukee Road shall issue suitable coupons or other evidence to such persons showing their payment of the excess fares.

3. If the decree is reversed and injunction dissolved, the Milwaukee Road shall retain the impounded excess fares and may transfer them to its general funds.

4. If the decree is affirmed or the appeal is dismissed or discontinued, the Milwaukee Road shall post immediately in its suburban stations, notice that refund will be made of the excess fares to the persons who have paid them.

5. Six months after the posting of such notice, the Milwaukee Road shall file a report in this court setting forth the total amount of the excess fares impounded, the total amount of refunds made therefrom, and the balance of the impounded excess fares then unclaimed. At the same time the Milwaukee Road shall deposit with the Clerk of this Court the amount of such unclaimed balance.

6. Thereupon, upon petition of plaintiffs, and evidence showing reasonable expenses (including reasonable attorneys' fees) incurred by each of the plaintiffs in the proceeding before the Interstate Commerce Commission, reviewed in this case, in prosecuting this case in this Court, and in connection with the appeal from the decree herein, the Court shall order that the amount of said reasonable ex-

penses shall be paid to plaintiffs from the unclaimed balance of the impounded excess fares. Any remaining balance shall be retained by the Clerk subject to such disposition as this Court may direct.

7. The Court retains jurisdiction of this case to enter such further orders as may be required to carry this order into effect.

ENTER:

Elmer J. Schnackenberg, Circuit Judge, Philip L. Sullivan, Judge, Walter J. La Buy, Judge.

Dated: June 18, 1956

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FILED
APR 22 1959
Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 793

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,

Appellant,

vs.

STATE OF ILLINOIS, ILLINOIS COMMERCE COMMISSION, AND MILWAUKEE ROAD COMMUTERS' ASSOCIATION,

Appellees.

MOTION OF APPELLEE, MILWAUKEE ROAD COMMUTERS' ASSOCIATION, TO AFFIRM THE ORDER OF THE DISTRICT COURT FROM WHICH THIS APPEAL IS TAKEN,

AND

BRIEF OF APPELLEE IN SUPPORT OF THE MOTION.

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THE DUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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IN THE

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CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,

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STATE OF ILLINOIS, ILLINOIS COMMERCE COMMISSION, AND MILWAUKEE ROAD COMMUTERS' ASSOCIATION,

Appellees.

MOTION OF APPELLEE, MILWAUKEE ROAD COMMUTERS' ASSOCIATION, TO AFFIRM THE ORDER OF THE DISTRICT COURT FROM WHICH THIS APPEAL IS TAKEN.

Appellee, Milwaukee Road Commuters' Association, moves that the order of the District Court entered December 24, 1958, from which the appeal in this case was taken, be affirmed for the reasons that: (1) the order appealed from is in accord with the law of this case; and (2) the questions raised by appellant are so unsubstantial as not to need further argument.

S. ASHLEY GUTHRIE,
FRANCIS D. FISHER,
Attorneys for Milwaukee Road Commuters' Association.

BRIEF OF APPELLEE IN SUPPORT OF THE FOREGOING MOTION.

STATEMENT OF THE CASE.

The Nature of the Case.

This is the third appeal to the Supreme Court taken by appellant (herein referred to as "the Milwaukee Road") in this case.

The present appeal is from an order of a three-judge District Court entered December 24, 1958, denying the motion of the Milwaukee Road that "the unclaimed balance" of a fund in Court consisting of certain impounded excess fares, be paid to the Milwaukee Road instead of being applied first to the payment of plaintiffs' attorneys' fees and other expenses in this litigation, as directed in the order creating the fund (herein referred to as "the impounding order").

As shown below the same question was raised by the Milwaukee Road on its motion of February 10, 1958, asking the Court to disregard the provision of the impounding order requiring refund of the impounded excess fares to the commuters applying therefor, and was decided adversely to the Milwaukee Road by the District Court's order of February 28, 1958, denying that motion.

We submit that the order of February 28, 1958, last referred to, is clearly decisive of the issue here raised. But even if that issue were now raised for the first time, there

ould be no substantial question as to the binding effect f the impounding order (agreed to by all parties at the ime it was entered) on the disposition of the fund created ursuant to that order.

The Provisions of the Impounding Order and the Circumstances Under Which It Was Entered.

The impounding order was entered by a three-judge District Court under the following circumstances:

On June 14, 1956, the District Court entered a decree (1) declaring invalid an order of the Interstate Commerce Commission which directed an increase in the Milwaukee Road's Illinois intrastate fares; and (2) enjoining collection of the excess fares as directed by that order.

The Milwaukee Road filed notice of appeal from that decree. Thereafter, on June 18, 1956, on motion of the Milwaukee Road, and by agreement of the parties, the District Court entered the impounding order staying the injunction against the collection of the excess fares during pendency of the appeal, on condition that the excess fares collected be impounded by the Milwaukee Road, and that upon determination of the case on appeal, the impounded excess fares be disposed of as follows (See Appendix D to Juris, Stmt. pp. 24a-25a):

"• • •

3. If the decree is reversed and injunction dissolved, the Milwaukee Road shall retain the impounded excess fares and may transfer them to its general funds.

4. If the decree is affirmed or the appeal is dismissed or discontinued, the Milwaukee Road shall post immediately in its suburban stations, notice that refund will be made of the excess fares to the persons who have paid them.

5. Six months after the posting of such notice, the Milwaukee Road shall file a report in this court setting forth the total amount of the excess fares impounded,

the total amount of refunds made therefrom, and the balance of the impounded excess fares then unclaimed. At the same time, the Milwaukee Road shall deposit with the Clerk of this Court the amount of such unclaimed balance.

6. Thereupon, upon petition of plaintiffs, and evidence showing reasonable expenses (including reasonable attorneys' fees) incurred by each of the plaintiffs in the proceeding before the Interstate Commerce Commission, reviewed in this case, in prosecuting this case in this Court, and in connection with the appeal from the decree herein, the Court shall order that the amount of said reasonable expenses shall be paid to plaintiffs from the unclaimed balance of the impounded excess fares. Any remaining balance shall be retained by the Clerk subject to such disposition as this Court may direct.

* * *."

The decree of the District Court was affirmed by the Supreme Court on January 13, 1958 (*C. M. & St. P. R. Co. v. Illinois*, 355 U. S. 300). On affirmance of the decree, and under the above-quoted provisions of the impounding order, the Milwaukee Road was obligated to proceed immediately (1) to make the specified refunds to commuters applying therefor; and (2) to deposit any unclaimed balance with the Clerk of the District Court to be applied first in payment of plaintiffs' (appellees') expenses and then as the Court might direct.

THE ORDER OF FEBRUARY 28, 1958, REQUIRING REFUND OF THE IMPOUNDED EXCESS FARES AS PROVIDED IN THE IMPOUNDING ORDER.

The Milwaukee Road sought to avoid the obligation thus imposed upon it by the impounding order, and on February 10, 1958, following the affirmance of the decree, filed a motion in the District Court asking for leave to retain the impounded fund pending disposition of further proceedings

before the Interstate Commerce Commission, and subject to further order of court at the conclusion of those proceedings. The motion was denied by the District Court on February 28, 1958 and the Milwaukee Road was directed to proceed immediately with the refund.

Attached hereto, as Appendices 1, 2 and 3 respectively (pp. 17 *et seq.* below) are copies of the motion, extract from the transcript of proceedings thereon, and order of the District Court of February 28, 1958 denying the motion.

An appeal to the Supreme Court was taken from the order denying the motion; an application for supersedeas staying the order pending appeal was made to the three-judge District Court and denied; and a like application for supersedeas was made to the Supreme Court and was also denied (*C. M. & St. P. R. Co.* v. *Illinois*, 356 U. S. 906). Later, in May, 1958, the appeal to the Supreme Court was dismissed for want of prosecution.

The District Court's order of February 28, 1958, requiring compliance with the provisions of the impounding order as to disposition of the impounded fund, thus stands as a final order, conclusive in this case, on the question involved in the present appeal.

THE REFUNDS TO COMMUTERS APPLYING THEREFOR, AND DEPOSIT OF THE UNCLAIMED BALANCE WITH THE CLERK OF THE DISTRICT COURT.

Upon denials of the motion for supersedeas, staying the order of February 28, 1958, the Milwaukee Road was required to, and did, comply with the provisions of that order, and proceeded with the refunds as required thereby.

After a six-month interval, and again pursuant to the impounding order, the Milwaukee Road filed its report showing completion of the required refunds to the qualified applicants therefor, and showing an unclaimed balance

on hand of $229,565. The unclaimed balance was deposited with the Clerk of the District Court as required by the impounding order.

THE ORDER OF DECEMBER 24, 1958, HERE APPEALED FROM DIRECTING DISPOSITION OF THE UNCLAIMED BALANCE AS SPECIFIED IN THE IMPOUNDING ORDER.

Under the impounding order, the unclaimed balance so deposited with the Clerk of Court was held in trust to be used first to pay the expenses incurred by plaintiffs in the litigation, and then as the Court might direct.

The Milwaukee Road, however, again attempted to set aside the provisions of the impounding order, and filed a motion asking that all funds on deposit be paid to the Milwaukee Road.

The District Court denied that motion, and on December 24, 1958, entered an order* directing that the unclaimed balance in the impounded fund be applied as provided in the impounding order: (1) in payment of plaintiffs' (appellees') expenses, the amounts of which were to be determined by the Court on evidence presented; and (2) that any remaining balance be paid over to the Milwaukee Road.

The present appeal is from that order of December 24, 1958.

The issue raised on the appeal is the same as that raised by the motion of February, 1958, wherein the Milwaukee Road sought to be relieved of the obligation to make the refund of excess fares to the commuters paying them, and decided by the order of February 28, 1958 denying that motion.

In both instances, the question involved is whether the

* Note: See Appendices A and B to Juris. Statement, reported in *Illinois* v. *United States*, 168 Fed. Supp. 706.

provisions of the impounding order providing for disposition of the impounded fund are binding. The order of February 28, 1958 holds that those provisions are binding and is conclusive in this case.

THE ORDER OF THE INTERSTATE COMMERCE COMMISSION OF OCTOBER 31, 1958—ITS VACATION AND ABSENCE OF EFFECT IN THIS CASE.

The only new matter referred to in the Jurisdictional Statement on the pending appeal is the entry by the Interstate Commerce Commission of a new order of October 31, 1958 (Juris. Statm't. pp. 21a-22a) directing an increase in the Illinois intrastate fares of the Milwaukee Road.

That order has no present effect.

On April 4, 1959, after the Jurisdictional Statement herein was filed, the order was vacated by the Interstate Commerce Commission because the Illinois Commerce Commission had entered an order approving and putting into effect on February 6, 1959, a schedule of increased fares, theretofore filed with the Illinois Commission by the Milwaukee Road.

While the order of the Interstate Commission vacating its prior order of October, 1958, also stated that the theretofore pending motion of this appellee for reconsideration of the October order was overruled, that part of the vacating order had and has no effect. The order of October, 1958 is no longer in existence, so that there is nothing to which the motion for reconsideration could apply.

But even if the October order of the Interstate Commerce Commission had not been vacated, it is not retroactive in its operation. By its terms, it was to go into effect on February 6, 1959. It could not validate or make effective the prior order of the Commission or alter the binding effect of the District Court's impounding order as to the

disposition of the impounded fund. The fact that the impounding order must be complied with (irrespective of prospective further proceedings before the Interstate Commerce Commission) was determined by the order of February 28, 1958 (as to which supersedeas was denied and the appeal was ultimately dismissed) insofar as it required refunds to commuters.

There is no basis for a different ruling as to the binding effect of the remaining provisions of the impounding order relating to the disposition of the unclaimed balance of the fund.

ARGUMENT.

I.

THE ISSUES RAISED ON THIS APPEAL HAVE BEEN PREVIOUSLY DETERMINED AND ARE THE LAW OF THIS CASE.

A.

THE RIGHTS IN THE IMPOUNDED FUND WERE SETTLED BY THE IMPOUNDING ORDER OF JUNE 18, 1956, WHICH ORDER IS NOT SUBJECT TO REVIEW.

This is not a case where money was held or set aside to be disposed of as the Court might determine in the future. The impounded fund of excess fares was collected under the terms of an order entered by the District Court on June 18, 1956 at the time of the first appeal to the Supreme Court.

The impounding order of June 18, 1956 provides in specific detail just what is to be done with the impounded excess fares upon affirmance of the District Court decree.

The impounding order provides that the Milwaukee Road must first refund the excess fares to all persons who paid them and who applied for refund within six months. That has been done.

The impounding order provides that at the conclusion of the six month period the balance of the impounded fares must be deposited with the Clerk of the District Court. That has been done.

The impounding order then provides: that plaintiffs are

to present to the District Court petitions and evidence "showing reasonable expenses (including reasonable attorneys' fees)" in connection with the case; and then that

> "* * * The Court shall order that the amount of said reasonable expenses shall be paid to plaintiffs from the unclaimed balance of the impounded excess fares."

The right of plaintiffs (appellees) to have their expenses paid from the unclaimed balance is thus clearly and finally fixed by self-executory provisions of the impounding order.

The impounding order was entered on the motion of the Milwaukee Road and its terms were consented to by the Milwaukee Road. The authority of the Milwaukee Road to continue to collect the excess fares was granted on the express condition that the impounded funds would be disposed of as provided in the impounding order. No appeal was taken from the impounding order—nor could have been, since it was an agreed order. Its provisions as to the right of plaintiffs to have their expenses paid from the unclaimed excess fares are not subject to review by the District Court and cannot be altered on this appeal.

B.

The Question Whether the June 18, 1956 Impounding Order Could Be Modified Was Decided Against the Milwaukee Road by Order of the District Court of February 28, 1958 Which Became Final When the Appeal from That Order Was Dismissed.

On February 10, 1958, after the decision by the Supreme Court affirming the District Court decree, the Milwaukee Road asked the District Court to relieve it of the obligation imposed by the impounding order to make refunds to commuters and to permit the Milwaukee Road to continue the impounding of the excess fares

> "for a period of 120 days or such other reasonable time as may be required to permit the I. C. C. to conduct further proceedings and make supplemental findings not inconsistent with the opinion of the Supreme Court of the United States entered on appeal of this matter on January 13, 1958." (Appendix 1, p. 17 below.)

The Milwaukee Road then argued that some future order of the Interstate Commerce Commission could in some way validate its prior invalid order so as to confer on the Milwaukee Road ownership in or right to retain the impounded monies notwithstanding the terms of the impounding order of June 18, 1956. The Milwaukee Road also argued that the defects of the Interstate Commerce Commission order were "procedural" and that equity required the District Court to set aside the impounding order and to grant the Milwaukee Road rights to the monies.

On February 28, 1958 the District Court denied this motion and required the terms of the June 18, 1956 impounding order to be complied with. (Appendices 2 and 3, pp. 18 *et seq.* below.)

The Milwaukee Road appealed to the Supreme Court from that order and filed an application for supersedeas. The application for supersedeas was denied (*Illinois* v. *United States*, 356 U. S. 906) and the appeal was later dismissed.

The Milwaukee Road, in its application to the Supreme Court for supersedeas both admitted and asserted that the question decided against it was primarily whether the Milwaukee Road could have any interest or ownership in the monies impounded under the impounding order of June 18, 1956.

In its brief in the Supreme Court in support of the application for supersedeas, the Milwaukee Road stated that "the very core of the present appeal [*i.e.* from the order of February 28, 1958] is the ownership of the impounded monies.

That the same question was involved in that appeal as in the present appeal is emphasized by the fact that in its Jurisdictional Statement in the present appeal the Milwaukee Road quotes from the dissenting opinion of the Supreme Court in connection with the denial of supersedeas. The Milwaukee Road thus by its own admission concedes that it is seeking to raise the same questions that were before the Supreme Court in the appeal from the February 28, 1958 order.

There is no difference between the legal question raised with respect to the obligation to refund the impounded monies to commuters applying therefor, and the obligation to apply the balance of the impounded monies to reimburse plaintiffs for their reasonable expenses.

In fact, with the denial of supersedeas the question remaining before the Supreme Court was substantially whether the Milwaukee Road had any rights to that portion of the impounded funds not refunded to commuters and which was to be paid as reimbursement for plaintiffs' expenses.

The Milwaukee Road chose not to prosecute that appeal and on May 12, 1958, it was dismissed for want of prosecution. Thus the decision of the District Court of February 28, 1958, which held that future action of the Interstate Commerce Commission could not give rise to any rights of the Milwaukee Road in the impounded funds inconsistent with the terms of the impounding order, is final.

II.

IF RIGHTS TO THE IMPOUNDED FUND WERE OPEN TO QUESTION AT THIS TIME, THE DISTRICT COURT DECISION ENFORCING THE TERMS OF THE IMPOUNDING ORDER SHOULD BE AFFIRMED.

In its argument that the terms of the impounding order may be set aside, the Milwaukee Road relies on the possibility of a subsequent order of the Interstate Commerce Commission. It sets forth, as Appendix C to its Jurisdictional Statement, the report and order of the Interstate Commerce Commission of October 31, 1958.

As pointed out at page 7 above, that order has been vacated and is of no present effect.

But if the fact were otherwise, the order of the Interstate Commerce Commission entered on October 31, 1958, did not have, and did not purport to have, any retroactive effect. It was based on conditions shown by new evidence offered in 1958, and by its terms, was to be effective on February 6, 1959. The order,—if it had become effective—would not validate or affect the excess fares collected in 1956 and 1957 and impounded pursuant to the impounding order of the District Court of June 18, 1956. The order of the Interstate Commerce Commission could not invalidate the impounding order of the District Court, or free the Milwaukee Road from the obligations imposed upon it by that order as to the disposition of the impounded fund.

Comment on the Florida and Morgan Cases, Relied Upon by the Milwaukee Road.

The Milwaukee Road relies on *Atlantic Coast Line R. R.* v. *Florida*, 295 U. S. 301 ("the *Florida* case") and *United States* v. *Morgan*, 307 U. S. 183 ("the *Morgan* case") to sustain its argument that the unpaid balance of the impounded fund should be paid over to it.

Those cases were also cited and relied on by the Milwaukee Road in support of its February 1958 motion, asking that it be excused from making the refund to commuters required by the impounding order, and in support of its application for supersedeas on the appeal from the order of February 28, 1958 denying that motion.

The District Court, in entering the order denying the motion, and the Supreme Court, in denying the application for supersedeas, held, in effect, that neither the *Florida* case nor the *Morgan* case supported the contention that subsequent proceedings before the Interstate Commerce Commission could free the Milwaukee Road from the obligation to dispose of the impounded fund as directed by express provision of the impounding order.

But in any event, neither case is in point.

The Florida Case.

The *Florida* case did not involve the disposition of any fund deposited in court. There was no such fund.

The case involved a suit by certain shippers for restitution of amounts paid for increase in fares authorized by an order of the Interstate Commerce Commission which was held valid by the District Court, but which was ultimately declared invalid by the Supreme Court on appeal.

The Court had before it the question as to whether that which had been lawfully done at the time must be undone.

The *Florida* case has no application to the rights of the commuters to a refund, or to the rights of plaintiffs to receive payment of their expenses, from the impounded fund, as specifically provided in the impounding order.

The only possible application of the *Florida* case in the instant case is in justifying that part of the District Court's order of December 24, 1958, permitting the Milwaukee Road to retain any balance remaining in the fund after completion of the refund to the commuters and payment of plaintiffs' expenses of litigation.

The impounding order makes no specific direction as to disposition of that remaining balance, and the District Court therefore cited the *Florida* case in support of that part of its order permitting the Milwaukee Road to retain it.

With that exception, the *Florida* case has no application here.

The Morgan Case.

The *Morgan* case (*United States* v. *Morgan*, 307 U. S. 183) is likewise not in point.

In the *Morgan* case the funds in question were impounded subject to further order of Court on final disposition of the case, and without any specific self-executing provision—as in the instant case—for the disposition of the impounded funds or termination of a pending appeal.

Furthermore, as the Court said in the *Morgan* case (p. 188):

> "[The] decision turns on the meaning and application of the provisions of the Packers and Stockyards Act * * *."

The Secretary of Agriculture had, by that act—what the Interstate Commerce Commission does not have—authority to determine reasonable rates in the past for the purpose

of determining what amounts are owed by a carrier to the shipper. As the Interstate Commerce Commission in this case is without authority to enter any further order as to what amounts should have been paid in the past by commuters, the *Morgan* case does not support the Milwaukee Road's motion.

We submit that the motion to affirm the order of the District Court, from which this appeal is taken, should be granted.

Respectfully submitted,

S. Ashley Guthrie,
Francis D. Fisher,
120 South LaSalle Street,
Chicago 3, Illinois,
Attorneys for Appellee, Milwaukee Road Commuters' Association.

APPENDIX 1.

IN UNITED STATES DISTRICT COURT,
Northern District of Illinois,
Eastern Division.

No. 56-C-681.

MILWAUKEE ROAD'S MOTION FILED FEBRUARY 10, 1958 FOR ORDER DIRECTING CONTINUED IMPOUNDING OF FARES PENDING FURTHER PROCEEDINGS BEFORE THE INTERSTATE COMMERCE COMMISSION.

Comes now defendant, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation, by Edwin R. Eckersall, E. O. Schiewe, R. K. Merrill, and J. P. Reedy, its Attorneys, and moves this Court to further stay the injunction prescribed by its decree entered June 14, 1956, and to order said defendant to continue the impounding of fares, as is now being done pursuant to this Court's order herein of June 18, 1956, for a period of 120 days or such other reasonable time as may be required, to permit the Interstate Commerce Commission to conduct further proceedings and make supplemental findings not inconsistent with the opinion of the Supreme Court of the United States entered on appeal of this matter, January 13, 1958.

Dated: February 10, 1958.

Edwin R. Eckersall,
E. O. Schiewe,
R. K. Merrill,
J. P. Reedy,
888 Union Station Bldg.,
Chicago 6, Illinois,
Telephone: CEntral 6-7600,
Attorneys for Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

APPENDIX 2.

EXTRACT FROM TRANSCRIPT OF PROCEEDINGS OF HEARING ON FEBRUARY 28, 1958 ON MILWAUKEE ROAD'S MOTION FOR LEAVE TO CONTINUE IMPOUNDING OF FARES, SET FORTH ON THE PRECEDING PAGE IV OF THIS APPENDIX.

* * * * *

Judge Schnackenberg: The members of the Court have read and studied the briefs filed, very exhaustive briefs in this case.

I would like to ask a question. We entered an order on June 18, 1956, providing for the impounding of money constituting the excess, alleged excess, fares to be paid by persons using the Milwaukee Road in suburban service. Was there any objection entered to the entry of that order, or was it an agreed order?

Mr. Guthrie: [For Plaintiff, Milwaukee Road Commuters Assn.] There was no objection. It was an agreed order, your Honor.

Judge Schnackenberg: Is that right, counsel?

Mr. Eckersall: [For Defendant, Milwaukee Road.] That is right, your Honor.

Judge Schnackenberg: That is correct, Mr. Eckersall answered for the railroad.

Mr. Eckersall: Your Honor, as I recall, counsel for plaintiff prepared the order. We had prepared one form of order, and they prepared the form that was entered.

Judge Schnackenberg: The order was entered upon the motion of counsel for the railroad?

Mr. Eckersall: That is correct, sir.

Judge Schnackenberg: The order uses the language that:

> "In the event the decree of this Court is affirmed, the excess fares may be refunded to the persons who paid them."

The Supreme Court of the United States, in its decision of January 13, 1958, page 9 of the printed opinion, states as follows:

> "The judgment of the District Court in remanding the case to the Commission for further consideration must be affirmed."

We have considered all of the arguments, and we are of the opinion that under the law enunciated by the Supreme Court in its decisions, the provisions of the Interstate Commerce Act, and the decree of this Court from which the appeal was taken, which set aside the order of the Commission and remanded the case to the Commission—

> "for further proceedings not inconsistent with the opinion this day filed herein,"

and the opinion of the United States Supreme Court to which I have just alluded, and especially the language of this order, agreed order, entered in this case, providing for the establishment of this fund and stating—

> "that if the decree is affirmed, the Milwaukee Road shall post immediately in its suburban stations notice that refunds will be made of the excess fares to the persons who have paid them,"

and the other provisions of that agreed order providing for the method of repayment, that under all these considerations the motion of the railroad that this fund be not held any longer should be and it is hereby overruled. An order may be prepared accordingly.

* * * * *

Mr. Merrill [also for the Milwaukee Road]: I wonder if I may state what the purpose of that motion was. It was

to continue to impound the fares already collected. I continue to hold them until the Interstate Commerce Commission has acted. We are ready to go back to the level of fares as soon as this Court enters its order. And that is the sole question we have before the bench this morning, as to whether the railroad may continue to hold this money for 120 days, until the Interstate Commerce Commission has a chance to act.

Judge Schnackenberg: No. You should start this afternoon making the refunds, if you are prepared to operate that fast. You should put up the notice today. I presume you have it already printed. You should put it up in all your suburban stations that the refunds will be made of the excess fares to the persons who paid them.

* * * * *

APPENDIX 3.

In United States District Court,
Northern District of Illinois,
Eastern Division.

No. 56-C-681.

ORDER ENTERED FEBRUARY 28, 1958 DENYING MOTION FOR LEAVE TO CONTINUE IMPOUNDING OF FARES, SET FORTH AT PAGE IV OF THIS APPENDIX.

This cause coming on to be heard on motion of Chicago, Milwaukee, St. Paul and Pacific Railroad Company (herein referred to as "the Milwaukee Road") one of the defendants herein, for the entry of an order staying the injunction prescribed by decree of this Court entered June 14, 1956 and ordering the Milwaukee Road to continue the impounding of fares in the manner provided for in this Court's order entered June 18, 1956, and the Court having received the briefs and heard the arguments of counsel and being fully advised in the premises,

It is ordered:

The motion of the Milwaukee Road for an order staying the injunction prescribed by decree of this Court entered June 14, 1956, and ordering the Milwaukee Road to continue impounding of fares in the manner provided for in the order of this Court entered June 18, 1956, is denied.

Enter:

Elmer J. Schnackenberg,
Circuit Judge.

Philip L. Sullivan,
Judge.

Walter J. LaBuy,
Judge

Dated: February 28, 1958.

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 793

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,

Appellant,

vs.

STATE OF ILLINOIS, ILLINOIS COMMERCE COMMISSION, AND MILWAUKEE ROAD COMMUTERS' ASSOCIATION,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

MOTION TO AFFIRM
or in the alternative
MOTION TO DISMISS.

LATHAM CASTLE,
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160 N. La Salle Street,
Chicago 1, Illinois,
Attorneys for State of Illinois and Illinois Commerce Commission.

THE SUNTHORP-WARREN PRINTING COMPANY, CHICAGO 56

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 793.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,

Appellant,

vs.

STATE OF ILLINOIS, ILLINOIS COMMERCE COMMISSION, AND MILWAUKEE ROAD COMMUTERS' ASSOCIATION,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

MOTION TO AFFIRM
or in the alternative
MOTION TO DISMISS.

The State of Illinois and Illinois Commerce Commission, two of the appellees in the above entitled cause, pursuant to Rule 16 of the Revised Rules of this Honorable Court, respectively move this court to affirm the decision of the court below upon the ground that the question submitted is so insubstantial as to require no further argument, or in the alternative, to dismiss the appeal as not being one which is reviewable upon direct appeal.

STATEMENT OF FACTS.

In a unanimous decision issued January 13, 1958, this court in *Chicago, Milwaukee, St. P. and P. R. Co.* v. *Illinois, et al.*, 355 U. S. 300, 2 L. ed. (2) 292, upheld the action of the lower court in setting aside an order of the Interstate Commerce Commission which had increased the intrastate suburban fares of the Railroad in the Chicago area. Although the order of the Interstate Commerce Commission had been voided by the decree of the District Court, the Railroad was allowed to collect the higher fares pending appeal to this court under an order of the District Court entered June 18, 1956 which stated:

"IT IS ORDERED:

1. The injunction prescribed by decree of this Court entered June 14, 1956, is stayed pending disposition of the appeal from that decree, heretofore taken to the Supreme Court of United States, and subject to the conditions below set forth.

2. The excess fares collected by the Milwaukee Road after April 20, 1956, pursuant to order of the Interstate Commerce Commission set aside by the decree, shall be impounded and held by the Milwaukee Road in a separate fund so that in the event the decree is affirmed, or the appeal therefrom is dismissed or discontinued, the excess fares may be refunded to the persons who paid them. The Milwaukee Road shall issue suitable coupons or other evidence to such persons showing their payment of the excess fares.

3. If the decree is reversed and injunction dissolved, the Milwaukee Road shall retain the impounded excess fares and may transfer them to its general funds.

4. If the decree is affirmed or the appeal is dismissed or discontinued, the Milwaukee Road shall post immediately in its suburban stations, notice that refund will be made of the excess fares to the persons who have paid them.

5. Six months after the posting of such notice, the Milwaukee Road shall file a report in this court setting forth the total amount of the excess fares impounded, the total amount of refunds made therefrom, and the balance of the impounded excess fares then unclaimed. At the same time, the Milwaukee Road shall deposit with the Clerk of this Court the amount of such unclaimed balance.

6. Thereupon, upon petition of plaintiffs, and evidence showing reasonable expenses (including reasonable attorneys' fees) incurred by each of the plaintiffs in the proceeding before the Interstate Commerce Commission, reviewed in this case, in prosecuting this case in this Court, and in connection with the appeal from the decree herein, the Court shall order that the amount of said reasonable expenses shall be paid to plaintiffs from the unclaimed balance of the impounded excess fares. Any remaining balance shall be retained by the Clerk subject to such disposition as this Court may direct.

7. The Court retains jurisdiction of this case to enter such further orders as may be required to carry this order into effect."

The order of June 18, 1956 was entered upon the motion of counsel for the Railroad and was an agreed order as counsel conceded at the proceedings held on February 28, 1958. (See Appendix A of Jurisdictional Statement, page 4a.)

After the opinion of this court (355 U. S. 300) and the filing of the mandate, the Railroad on February 10, 1958 filed a motion seeking to continue to hold the excess impounded fares pending the remandment to the Interstate Commerce Commission, rather than to immediately post notices and proceed with the refund in accordance with the provisions of the order of June 18, 1956. The motion of the Railroad was denied February 28, 1958 and it was instructed to forthwith comply with the provisions of the June 18, 1956 order pertaining to the refunding of the

impounded fares. On March 3, 1958, a notice of appeal to this court was filed from the order of February 28, 1958 and a request for supersedeas presented to this court which was denied on March 17, 1958.

The appeal prayed by the Railroad on March 3, 1958 from the order of February 28, 1958, which denied any modification or change in the order of June 18, 1956, was not prosecuted by the Railroad and the appeal to this court was dismissed on May 12, 1958. In compliance with the order of June 18, 1956, the Railroad made the refunds specified in said order, filed the report directed by paragraph 5 thereof and deposited with the Clerk of the District Court the amount of the unrefunded balance, aggregating $229,565.5..

The order which the Railroad now seeks to have reviewed is the order of December 24, 1958 denying the application of the Milwaukee Railroad for the entire unrefunded balance. (See Jurisdictional Statement, Appendix B, page 6a.) The opinion of the lower court (set forth as Appendix A to the Jurisdictional Statement) stated:

> "The agreed order of June 18, 1956, was a final and favorable determination of the right of plaintiffs to receive payment from the unclaimed balance of impounded excess fares covering their reasonable expenses (including reasonable attorneys' fees) incurred by each of them as referred to in said order. The only reservation of jurisdiction in regard thereto was for the purpose of entering such further orders as may be required to carrying that order into effect."

THE ISSUE.

Can the order of the District Court entered June 18, 1956, having been entered by consent of all the parties and now more than two years old with one attempt to modify (the motion of February 10, 1958) having been denied with the appeal from such denial having been dismissed, be now modified or changed upon the motion of the Railroad?

JURISDICTION OF THIS COURT.

While the order appealed from was entered by a 3-Judge District Court and appellant contends that jurisdiction of this court is conferred by 28 USCA 1253, the order on appeal is neither one granting or denying an interlocutory nor permanent injunction. While we prefer that this court affirm the order of the lower court and thereby bring an end to this matter, we would be less than candid if we did not at least raise the question of jurisdiction on a direct appeal.

ARGUMENT.

1. THE PRESENT CLAIM OF THE RAILROAD TO THE ENTIRE BALANCE OF THE UNREFUNDED MONEY CONSTITUTES A COLLATERAL ATTACK ON THE ORDER OF JUNE 18, 1956.

The order of June 18, 1956 was a consent order agreed to by the Milwaukee Railroad and was entered at its behest. That order contains specific provisions as to the disposition of the funds collected during the appeal—(i) in the event the Railroad is successful, and (ii) in the event the plaintiffs are successful. Since the affirmance of the basic case by this court, the Railroad has refunded to all those people making claim; has filed its report showing the amounts collected, the amount refunded and the balance; and has deposited with the Clerk of the District Court the unrefunded balance. Consequently, not only was the order of June 18, 1956, with all of its terms, entered by consent of all the parties, but the Railroad has complied with more than half of that order. The Railroad is not only estopped to contest the remaining of the provisions of the order of June 18, 1956, but that order is not subject to collateral attack. See 37 Am. Jur. 516 (Motions, Sec. 36) where it is stated:

> "Orders, like judgments, are not ordinarily subject to collateral attack, except for want of jurisdiction or fraud in their procurement."

The order was clearly one which the District Court had power and authority to enter, and being a consent order, could not have been procured by fraud.

2. THE ORDER OF JUNE 18, 1956 WAS AN ORDER BY CONSENT AND CANNOT BE CHANGED OR MODIFIED UPON MOTION OF ONLY ONE OF THE CONSENTING PARTIES.

Even if the order of June 18, 1956 were neither final nor otherwise impervious to collateral attack, the Railroad cannot, by motion, change or modify the terms of that order. As we have shown, the order was entered by consent. In such a situation no change can be made upon the request of only one of the consenting parties. See *May* v. *Moss,* 212 Fed. (2) 400.

Although the order of June 18, 1956 stated that the court retain jurisdiction to enter further orders, such retention was solely for the purpose of entering further orders "as may be required to carry *this order* into effect." (Emphasis added.) There was no retention of jurisdiction to issue other orders contrary to or at odds with the order of June 18, 1956. Any order which would now give the Railroad all of the unrefunded money without first allowing expenses and attorneys' fees would be counter to that order and not in aid thereof.

3. THE ORDER OF DECEMBER 24, 1958 IS NOT REVIEWABLE BY THIS COURT ON A DIRECT APPEAL.

The order sought to be appealed directly to this court is not one granting or denying an injunction. It is at most an order disposing of a fund which has been impounded by the District Court.

The mere fact that the order was the creation of a 3 judge court does not make it one appealable directly to this court. *Public Service Commission* v. *Brashear Freight Lines,* 312 U. S. 621, 626, 85 L. ed. 1083; *Public Service Commission* v. *Columbia Terminals,* 309 U. S. 620, 84 L. ed. 984; *Public Service Commission* v. *Brashear Freight Lines,* 306 U. S. 204, 207, 83 L. ed. 608; *Phillips* v. *United States,* 312 U. S. 246, 85 L. ed. 800.

Orders affecting the disposition of impounded funds are not decrees granting or denying an injunction authorizing a direct appeal, *American Insurance Company* v. *Lucas*, 314 U. S. 575, 86 L. ed. 466, and such an appeal will be dismissed.

CONCLUSION.

For the foregoing reasons we respectfully submit that the decision of the District Court in refusing to change or modify its order of June 18, 1956 is correct and that the order should be affirmed; or, the appeal be dismissed as being improperly appealed to this court.

Respectfully submitted,

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Dated: April 22, 1959.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 793

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,

Appellant,

vs.

STATE OF ILLINOIS, ILLINOIS COMMERCE COMMISSION, and MILWAUKEE ROAD COMMUTERS' ASSOCIATION,

Appellees.

BRIEF OF APPELLANT, CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, IN OPPOSITION TO MOTIONS OF APPELLEES TO AFFIRM OR TO DISMISS.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. 793

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,

Appellant,

vs.

STATE OF ILLINOIS, ILLINOIS COMMERCE COMMISSION, and MILWAUKEE ROAD COMMUTERS' ASSOCIATION,

Appellees.

BRIEF OF APPELLANT, CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, IN OPPOSITION TO MOTIONS OF APPELLEES TO AFFIRM OR TO DISMISS.

SUMMARY OF ARGUMENT.

I.

This Court has jurisdiction of the present direct appeal from the district court's order of December 24, 1958, under 28 U.S.C.A., Section 1253, even though such order did not grant or deny a temporary or permanent injunction. The order appealed from was entered during the course of proceedings which were supplementary to, and an

integral part of, litigation which granted a permanent injunction and which heretofore has come to this Court on direct appeal. This order was entered ostensibly to enforce the rights and obligations of the parties which arose in the main litigation. Under such circumstances jurisdiction of the present appeal is attributable to the jurisdiction of the principal cause. Appellees cite no decisions to the contrary.

II.

The parties' rights in the unclaimed fares were not determined by the agreed order of June 18, 1956. The unclaimed fund, the present subject of this litigation, was not then in existence. The doctrine of *res judicata,* therefore, does not apply. There has been no adjudication on the merits; hence appellant is not estopped by its consent to the order of June 18, 1956, from asserting its right to the unclaimed fares, and the lower court erred in holding that such order finally determined the parties' rights thereto.

III.

The parties' rights to the unclaimed fund were not in issue in February, 1958, but only the right of the patrons to receive immediate refunds from the impounded fares. No unclaimed fund existed in February, 1958. Appellant is not now estopped to contest appellees' rights to the unclaimed fares and to assert its own right thereto.

IV.

The cases cited in appellant's Jurisdictional Statement, pages 8-12, are in point on both facts and law with the instant litigation and cannot be distinguished herefrom. The terms of the order vacating the order entered by the

Interstate Commerce Commission on October 31, 1958, clearly indicates that its report and its findings of the same date were not vacated or stricken from the record but remain in full effect. The vacating order was entered pursuant to the policy of that Commission to observe the principles of comity so that the states may exercise jurisdiction of purely intrastate matters. Appellant's right to receive all of the now unclaimed fares remains confirmed by the Commission's findings of October 31, 1958, under the decisions of this Court on which appellant relies. Such an effect does not involve an objectionable retroactive application of the Commission's said order.

ARGUMENT.

I.

This Court Has Jurisdiction of This Direct Appeal from the District Court's Order of December 24, 1958.

A. The Questions Presented in This Appeal Are an Integral Part of Litigation Involving Injunctive Relief.

Appellee Commuters' Association does not question this Court's jurisdiction on this appeal. Appellees, the State of Illinois and Illinois Commerce Commission, suggest that a direct appeal to this Court does not lie from the three-judge district court's order of December 24, 1958, because such order did not grant or deny either an interlocutory or a permanent injunction. Brief of State of Illinois, 7-8. Where, however, an order has been entered during the course of proceedings properly before a duly constituted three-judge court and the main proceedings resulted in granting or denying injunctive relief, then the appeal from such order lies directly to this Court. The cases cited by appellant at pages 3 and 4 of its Jurisdictional Statement are authority for this view.

Arkadelphia Co. v. *St. Louis S. W. Ry. Co.*, 249 U.S. 134, 39 S.Ct. 237, 63 L.ed. 517 (1919), involved a suit against a state railroad commission and other state officials for injunctions to restrain the enforcement of certain reduced rates promulgated by the commission. Injunctive relief was decreed in accordance with the petitions. When such decrees were reversed and the cause remanded pursuant to *Allen* v. *St. Louis, Iron Mt. & S. R. Co.*, 230 U.S. 553, 33 S.Ct. 1030, 57 L.ed. 1625 (1913), the lower court referred to a master the issue of the amount of damages sustained by the commissioners. Certain shippers intervened and

presented claims for refunds of charges paid by them during the period between entry of the temporary injunction and the reversal of the decrees. When the district court approved the master's report allowing such claims, various railroads perfected appeals both to this Court and to the circuit court of appeals.

At the outset the question was raised whether the decree allowing the claims was a proper subject of direct appeal to this Court. Mr. Justice Pitney held on behalf of this Court, at 249 U.S. 142, 63 L.ed. 523:

> "The present appeals relate to a decree made in a subordinate action ancillary to the main causes, in which, as has been stated, the federal jurisdiction was invoked solely upon the ground that the cases arose under the Constitution of the United States. It has been held repeatedly that jurisdiction of subordinate actions is to be attributed to the jurisdiction upon which the main suit rested, and hence that where jurisdiction of the main cause is predicated solely on diversity of citizenship and the decree therein is for this reason made final in the circuit court of appeals, the judgments and decrees in the ancillary litigation also are final."

At the same page, the Court also said:

> "The proceeding out of which the decree now in question arose was not merely ancillary but was in effect a part of the main causes, taken for the purpose of carrying into effect the decrees of this court reversing the final decrees in the main causes and, at the same time, for the purpose of giving effect to a reservation of jurisdiction by the court below as contained in those final decrees. The supplementary decree that is now before us, since it simply brings to a conclusion those former suits pursuant to our decrees therein, must be treated as involving the construction and application of the Constitution of

> the United States and as being made in a case in which a state law was claimed to be in contravention of the Federal Constitution, within the meaning of § 238, Judicial Code."

Similarly in the instant cause, the order appealed from, based as it is upon the order of June 18, 1956, arose out of and during the proceedings which led to the injunction decreed on June 14, 1956, pursuant to *State of Illinois* v. *United States*, 146 F.Supp. 195 (D.C. N.D. Ill., 1956). That decree already has been reviewed by this Court on direct appeal. *Chicago, M., St. P. & P. R. Co.* v. *Illinois*, 355 U.S. 300, 78 S.Ct. 304, 2 L.ed. 2d 292 (1958). The instant appeal properly invokes the jurisdiction of this Court as attributable "to the jurisdiction upon which the main suit rested".

A similar case is *Baltimore & O. R. Co.* v. *United States*, 279 U.S. 781, 49 S.Ct. 492, 73 L.ed. 954 (1929). This litigation began by a petition to set aside and enjoin enforcement of an order of the Interstate Commerce Commission requiring absorption of certain transfer charges. *Chicago, R.I. & P. Ry. Co.* v. *B. & O. R.R. Co.*, 113 I.C.C. 681 (1926). A three-judge district court dismissed the suit for want of equity, and, on direct appeal to this Court, was reversed. *Baltimore & O. R. R.* v. *United States*, 277 U.S. 291, 48 S.Ct. 520, 72 L.ed. 885 (1928). The Baltimore and Ohio Company and others applied to the district court for a decree in conformity to the mandate of this Court. Appellants alleged they had been obliged to comply with the Commission's erroneous decree until it was set aside by this Court and prayed for restitution of the transfer charges they had paid in the interim. The three-judge court denied the application for restitution, and appellants appealed directly to this Court.

Citing the *Arkadelphia* decision, this Court said at page 783 of 279 U.S., 956 of 73 L.ed.:

"Moreover the proceeding below out of which the denial of restitution arose is incidental to and in effect a part of the main suit. Under the Act a court of three judges was required for the entry of the decree on the mandate. *Ex parte United States, supra,* 424. *Ex parte Metropolitan Water Co.,* 220 U.S. 539, 544. The jurisdiction of the court so constituted necessarily includes power to make all orders required to carry on such suits and to enforce the rights and obligations of the parties that arise in the litigation. This appeal rests on the same foundation as did the first."

Thus the decree appealed from, like that in the cause at bar, did not involve the granting or denying of injunctive relief. But this Court took jurisdiction of the direct appeal because the restitution issue was incidental to and a part of the principal suit. So here, the parties' rights in the unclaimed fares are a part of the main litigation in the instant cause.

Atlantic Coast Line v. *Florida,* 295 U.S. 301, 55 S.Ct. 713, 79 L.ed. 1451 (1935), is another instance of a direct appeal to this Court from an order which did not grant or deny an injunction. The Interstate Commerce Commission enjoined the maintenance of certain low rates which it found resulted in unjust discrimination against interstate commerce. When the railroads accordingly established higher rates, the State of Florida and others sued before a three-judge district court to set aside and enjoin enforcement of the Commissioner's order. The district court dismissed the bills, *State of Florida* v. *United States,* 30 F.2d 116 (D.C. N.D. Ga., 1929) *supplemental opinion rendered,* 31 F.2d 580; but on direct appeal, this Court reversed, because the Commission's report did not contain certain necessary findings. *Florida* v. *United States,* 282 U.S. 194, 51 S.Ct. 119, 75 L.ed. 291 (1931). On

remand the Commission heard new evidence and made new findings, on the basis of which it prescribed the same increased fares which it had first promulgated. This second order was also attacked in the district court, and the bills were again dismissed. *State of Florida* v. *United States,* 4 F.Supp. 477 (D.C.N.D. Ga., 1933). This Court affirmed in *Florida* v. *United States,* 292 U.S. 1, 54 S.Ct. 603, 78 L.ed. 1077 (1934).

During the course of the litigation certain shippers brought a separate suit for restitution of the difference between the former lower rate and the increased rate which had been exacted during the litigation. Pursuant to a master's report, the district court decreed restitution of nearly $100,000.00. *State of Florida* v. *United States,* 11 F.Supp. 36 (D.C.N.D. Ga., 1934) Cross appeals were taken directly to this Court. The question of this Court's jurisdiction of such appeals was not discussed in the opinion other than the citation of the *Arkadelphia* and *Baltimore and Ohio* decisions at 295 U.S. 308, 79 L.ed. 1457.

This Court thus took jurisdiction of a direct appeal from an order entered in a proceeding entirely separate from the main litigation. The separate suit, although in equity, sought, not an injunction, but a money judgment. In the *Atlantic Coast Line* case, it was a sufficient basis for this Court's jurisdiction that the cause of action arose out of conditions brought about by the principal litigation. That the order appealed from was entered in another action did not impede the appellate jurisdiction of this Court.

Inland Steel Co. v. *U.S.,* 306 U.S. 153, 59 S.Ct. 415, 83 L.ed. 557 (1939), involved a similar issue of which this Court took jurisdiction on direct appeal. The suit in the lower court was brought to set aside and enjoin en-

forcement of an order of the Interstate Commerce Commission prohibiting a railroad's payment of unlawful switching allowances to certain steel industries pursuant to a tariff provision. The three-judge court stayed the Commission's order by an interlocutory injunction providing that the allowances becoming due and payable during the litigation should be held by the railroad pending the court's further order. The district court subsequently dismissed the petition, dissolved the injunction, and ordered the accrued allowances to be retained by the railroad. *Inland Steel Co.* v. *United States*, 23 F. Supp. 291 (D.C.N.D. Ill., 1938).

On direct appeal to this Court, Mr. Justice Black indicated that no question of the granting or denying of an injunction was involved. At pages 155-156 of 306 U.S., 560 of 83 L.ed., the opinion stated:

> "Appellant concedes the correctness of the District Court's decree holding the Commission's order valid, dismissing the petition and denying a permanent injunction. The appeal only seeks a review of the court's action in ordering that the unlawful allowances accumulated after the date of the interlocutory injunction be retained by the Railroad and not paid to appellant."

As in the instant case, the question before this Court on direct appeal related only to the equitable propriety of the lower court's distribution of the funds accumulated during the litigation of the validity of the Commission's order.

Jurisdiction of another direct appeal involving the disposition of accumulated funds was accepted by this Court in *United States* v. *Morgan*, 307 U.S. 183, 59 S.Ct. 795, 83 L.ed. 1211 (1939). The principal litigation arose when the Secretary of Agriculture issued an order under

the Packers and Stockyards Act, 42 Stat. 159, 7 U.S.C. Secs. 181-229, condemning certain rates of market agencies at the Kansas City stockyards and prescribing lower rates for the future. In a suit to set aside this order, the three-judge district court temporarily restrained its enforcement pending a determination on the merits, but upon condition that the market agencies in the interim should deposit in court the excess of their rates over those prescribed in the Secretary's order. On two previous direct appeals this Court held that a full hearing had not been accorded the parties and twice remanded the cause to the Secretary for further proceedings. *Morgan* v. *United States,* 298 U.S. 468, 56 S.Ct. 906, 80 L.ed. 1288 (1936); 304 U.S. 1, 23, 58 S.Ct. 773, 999, 82 L.ed. 1129, 1135 (1938).

After further action by the Secretary had begun on the second remand, appellants moved to stay further proceedings in the district court and to direct retention of the impounded funds until the Secretary should have entered a final order. The lower court denied this motion, but it granted a counter-motion by appellees to distribute the fund among them. *Morgan* v. *United States,* 24 F.Supp. 214 (D.C.W.D. Mo., 1938). This Court accepted jurisdiction on direct appeal.

The similarity of the *Morgan* case to the instant cause is striking. Both raised the question of the proper disposition of a fund in court. Both funds were created and accumulated during the course of litigation involving injunctive relief. Although not essential to final adjudication of the principal litigation, the questions on both appeals were initiated by motion in the lower court.

Mr. Justice Stone suggested a basic reason for treating such ancillary matters as part of the main litigation when he stated in the *Morgan* decision, at 307 U.S. 191, 83 L.ed. 1217, that:

> " . . . in exerting its extraordinary powers to stay execution of a rate order, and in directing payment into court of so much of the rate as has been found administratively to be excessive, [the District Court] assumes the duty of making disposition of the fund in conformity to equitable principles."

Just as this Court took jurisdiction of the direct appeals in the above cases on the ground that the questions arose from, and were a part of, the main litigation involving the granting or denying of injunctive relief, so should jurisdiction be taken of this direct appeal. The cases cited above are in point with this on their facts and are authority for such result.

B. Authority Cited By Appellees Is Not in Point to Deny This Court's Jurisdiction.

Appellees, the State of Illinois and Illinois Commerce Commission, rely on five decisions at pages 7-8 of their Motion to Affirm or Dismiss which they allege to be authority for dismissing this appeal because jurisdiction is lacking but these decisions are not applicable to the instant appeal. In four of appellees' cases, this Court was obliged to deny jurisdiction of a direct appeal because the three-judge lower court did not itself have jurisdiction.

In the fifth case, *Pub. Serv. Com'n* v. *Brashear Lines*, 306 U.S. 204, 59 S.Ct. 480, 83 L.ed. 608 (1939), no controversy was involved because appellant had prevailed below. In this suit to enjoin officials and agencies of the State of Missouri from enforcing allegedly unconstitutional provisions of that state's Bus and Truck Law, appellants counterclaimed for fees and licenses which respondents owed. The three-judge court found the Bus and Truck Law constitutional and dismissed the bill. *Brashear Freight Lines* v. *Public Service Commission*, 23

F.Supp. 865 (D.C.W.D. Mo., 1938). It also dismissed the counterclaim, as this Court stated in *Pub. Serv. Com'n v. Brashear Lines,* 312 U.S. 621, at 623-624, 61 S.Ct. 784, 85 L.ed. 1083, at 1085 (1941):

> ". . . because of 'serious doubt as to the right of the defendants to maintain' such an action."

Plaintiffs below did not appeal, but respondents appealed directly to this Court from the dismissal of their counterclaims.

This appeal was dismissed for lack of jurisdiction on the ground that appellants were the successful parties below in that the bill for an injunction against them had been dismissed. The *per curiam* opinion of this Court held, at 306 U.S. 207, 83 L.ed. 610:

> ". . . as no appeal has been taken to review the decree denying the injunction, this Court is without jurisdiction."

Thus the first appeal in the *Brashear* case is strikingly dissimilar from the instant cause in that: (1) this appellant was not the successful party in the litigation below; and, (2) the present issues are not presented in the form of a counterclaim comprising an entirely different cause of action. A separate suit to obtain the presently unclaimed funds would command scant attention from any court.

After the first appeal had been dismissed, petitioners in the *Brashear* litigation moved for assessment of damages in the district court. This motion was denied on the ground, as stated by this Court at 312 U.S. 624, 85 L.ed. 1085-1086, that:

> ". . . the questions presented by the motion for damages had been ruled upon and finally determined by the judgment dismissing the original counterclaim."

The circuit court of appeals affirmed on the grounds, *inter alia*, that the counterclaim raised issues separable from the original litigation and that such claim was not appropriate for consideration by a three-judge court. *Public Service Com'n.* v. *Brashear Freight Lines*, 114 F.2d 1 (C.C.A. 8, 1940). On certiorari, this Court affirmed the separability of the damage questions from the principal litigation and held, at 312 U.S. 625, 85 L.ed. 1086, that:

> "Those questions were therefore for the consideration of the District Court in the exercise of its ordinary jurisdiction, and the three judge requirement of § 266 had no application."

It has never been suggested in this litigation that a single judge should have heard appellant's motion for a stay of the decree of June 14, 1956, or the proceedings on and subsequent to September 12, 1958. The reason is that the present issues are not separable from the proceedings in which the injunction of June 14, 1956, was decreed and that they were properly considered by the three-judge court as essential to complete equitable relief without multiplicity of litigation. In the second *Brashear* decision, at note 5, 312 U.S. 625-626, 85 L.ed. 1086, this Court stated:

> "A District Court composed of three judges under § 266 of course has jurisdiction to determine every question involved in the litigation pertaining to the prayer for an injunction, in order that a single lawsuit may afford final and authoritative decision of the controversy between the parties. *Railroad Commission* v. *Pacific Gas & Electric Co.*, 302 U.S. 388, 391; *Sterling* v. *Constantin*, 287 U. S. 378, 393-394."

Public Service Commission v. *Columbia Terminals*, 309 U.S. 620, 60 S.Ct. 471, 84 L.ed. 984 (1940), is merely a memorandum decision. The opinion of the lower Court,

Columbia Terminals Co. v. *Lambert,* 30 F. Supp. 28 (D.C. E.D. Mo., 1939), indicates that this case likewise has no bearing on the present issue. Jurisdiction of the three-judge court was predicated on the allegation that a state statute was unconstitutional and void under the commerce clause, U.S. Const., Art. I, Sec. 8. The district court dismissed the proceeding for want of jurisdiction because plaintiff had failed to exhaust his administrative remedies.

The Court stated at 30 F.Supp. 34:

> "The plaintiff has neglected to make application for a permit covering its operations in which the arrests of its drivers occurred since 1931, when the statute became effective. Until it does so, it is not in a position to invoke the injunctive powers of this Court to restrain the enforcement of the State laws. 'The long-settled rule of judicial administration [is] that no one is entitled to judicial relief • • • until the prescribed administrative remedy has been exhausted.' *Myers* v. *Bethlehem Corp.,* 303 U.S. 41, 50, 51, 58 S. Ct. 459, 463, 82 L. Ed. 638. And, where the defect in the bill is incapable of remedy by amendment, its dismissal must be ordered."

The lower Court itself had no jurisdiction of the action, and jurisdiction on direct appeal could not be conferred by this Court.

This also is not in point with the instant appeal. Here, there is no doubt that the three-judge court properly assumed jurisdiction of the cause presented and properly continued to exercise it until all issues pertaining to the injunctive relief requested were determined. There has never been a question that any party hereto has failed to exhaust its administrative remedies.

Phillips v. *United States,* 312 U.S. 246, 61 S.Ct. 480, 85 L.ed. 800 (1941), also is not applicable to the instant cause. The case began by a petition for an injunction

against state officials to restrain their interference with a federal flood control development. The three-judge district court decreed an interlocutory injunction. *United States* v. *Phillips,* 33 F.Supp. 261 (D.C.N.D. Okla., 1940). On direct appeal, Mr. Justice Frankfurter formulated the sole issue involved at 312 U.S. 248, 85 L.ed. 803, in the following terms:

> "But unless § 266 required the present suit to be heard by three judges, under the Jurisdictional Act of 1925 we are without authority to entertain this direct appeal from a district court. § 238 of the Judicial Code as amended, 28 U. S. C. § 345. Having concluded that there is a fatal bar to our entertaining the appeal, we are without power to consider the other issues that were argued here."

At page 253 of 312 U.S., 806 of 85 L.ed., the decision held:

> "In short, this is not a case for which the procedural structure of § 266 was devised."

Thus, the *Phillips* case was dismissed because it had not been properly before a three-judge court. As in other cases cited by appellee, the three judge district court originally had no jurisdiction of the initial suit.

American Insurance Company v. *Lucas,* 314 U.S. 575, 62 S.Ct. 75, 86 L.ed. 466 (1941), is only a memorandum opinion. The facts of this case appear from the opinions of the lower court, *American Ins. Co.* v. *Lucas,* 38 F.Supp. 896, 926 (D.C.W.D. Mo., 1940). To the extent that this case conflicts, if at all, with the decisions cited by appellant, at pages 4 to 11 hereof, the latter here are controlling as presenting factual situations and questions of law more closely akin to those in the instant proceeding.

The *Lucas* case is not inconsistent with acceptance of jurisdiction of this appeal. Any disposition of the unclaimed fares, as well as the order under which they

were collected, is an integral part of the original litigation which led to an injunction and review thereof by this Court on direct appeal. The object of appellant's motion of September 12, 1958, could not have been obtained by prosecuting a new, separate suit. The issue of the proper disposition of the unclaimed fares cannot be so divorced from the litigation which created them. The present issues, therefore, must be deemed a part of the original litigation herein and must be subject to the same appellate jurisdiction.

II.

The Order of June 18, 1956, Does Not Foreclose Appellants' Right To The Unclaimed Fares.

Appellees contend that the questions raised by this appeal are unsubstantial and that the order appealed from therefore should be affirmed because the order of June 18, 1956, was entered with the consent of appellant's counsel. Appellees suggest that such consent has bound appellant to the terms of that order so far as paragraph 6 relates to disposition of the unclaimed fares now in the control of the district court and that appellant therefore is not entitled to so much thereof as represent "reasonable expenses (including reasonable attorneys' fees) incurred" by appellees on account of this protracted litigation.

Appellant contends, on the contrary, that it is entitled to all of the unclaimed fares pursuant to previous decisions of this Court. The order of June 18, 1956, did not adjudicate and settle the rights of appellees in the unclaimed fund, and appellant's consent to that order, therefore, does not create or finally establish any rights thereto.

A. Res Judicata Does Not Apply Because No Rights in the Unclaimed Fares Were Adjudicated by the Order of June 18, 1956.

Appellees' contention that they are entitled as a matter of right to attorneys' fees out of the unclaimed fares is based wholly, as it must be, upon paragraph 6 of the order of June 18, 1956, Appendix D, Jurisdictional Statement, page 23a *et seq.* The parenthetical clause in that paragraph constitutes the only mention of attorneys' fees during nearly four years of litigation before the Interstate Commerce Commission and in the federal courts prior to September 12, 1958. No other pleading or order and no testimony or oral argument prior to appellant's motion on such date referred, directly or indirectly, to unclaimed fares or to either appellant's or appellees' rights therein.

When the order of June 18, 1956, was entered, no unclaimed fund was in existence to which anyone could have a right. The question of whether appellant's equity in the unclaimed fares is superior to appellees' right to attorneys' fees did not arise until it became certain that refunds would have to be made and until, in fact, an unclaimed balance remained at the close of the refund period. This was not until September 12, 1958, when appellant filed its report in the District Court indicating the existence of unclaimed fares. Until then it was only a speculative possibility that any of the impounded fares would not be claimed.

Such was the holding in a case involving similar facts. *Illinois Bell Telephone Co.* v. *Slattery,* 98 F.2d 930 (C.C.A. 7, 1938), *supplemental opinion rendered,* 102 F.2d 58 (1939). In prior litigation this Court had required the utility to make refunds of overcharges collected during litigation of the validity of a state commission rate order.

Lindheimer v. *Illinois Tel. Co.*, 292 U.S. 151, 54 S.Ct. 658, 78 L.ed. 1182 (1934). The refunds were made in due course and afterwards there remained a substantial amount unclaimed. In the *Slattery* case the state sought the unclaimed fund under the doctrine of *bona vacentia*. The utility opposed the claim on the ground of the attorney general's acquiescence in an earlier order which allegedly vested the right to such unclaimed charges in the utility. It was contended, as it now is in this case, that such order had settled the issue of the respective rights of the parties in the unclaimed fund.

The court of appeals held that *bona vacentia* did not apply in the case; but it also held that the issue of rights in the unclaimed portion of the fund did not arise until such a fund was found to be in existence. At 98 F.2d 933, the court stated that the question of rights in such fund:

> ". . . was not an issue between the parties to the original suit and was not involved in the original appeal to the Supreme Court. The question did not arise until June 1, 1937, when some $1,600,000 was found to remain unclaimed."

This Court denied certiorari. *Slattery* v. *Illinois Bell Telephone Co.*, 307 U.S. 648, 59 S.Ct. 1045, 83 L.ed. 1527 (1939).

Appellant contends, on the authority of the *Slattery* litigation, that any attempted adjudication of rights to the unclaimed fund in June, 1956, would have been a nullity. The non-existence of the subject matter of such an adjudication would have made the issue moot, as in an action in *rem* where the *res* was not in existence. *United States* v. *3 Unlabeled 25-Pound Bags Dried Mushrooms*, 157 F.2d 722 (C.C.A. 7, 1946). Mushrooms were there libeled under the Federal Food, Drug and Cosmetic Act,

52 Stat. 1040 *et seq.*, 21 U.S.C. Secs. 301-392, and destroyed pursuant to a judgment of the lower court. Thereafter, a motion for a new trial and vacation of that judgment was denied. On appeal the court held the existence of the mushrooms to be essential to the proceeding at 157 F.2d 723:

> "If we were to affirm the judgment, the District Court could not destroy the mushrooms. They have already been destroyed. If we reversed the judgment, there would be no mushrooms to restore to the claimant. The cause is clearly moot. We are not authorized to decide arguments but only 'cases and controversies.'"

Similarly the *res* consisting of the unclaimed fares was not in existence at the time the stay order was entered on June 18, 1956. Any determination of rights therein, at that time, similarly would have been moot.

Nor would it have been possible for appellant to prosecute an appeal from the stay order. It would not have constituted a "case or controversy". This is apparent from the *Slattery* case, at 102 F.2d 65, where the court said:

> "In fact, it could not be determined until June 1, 1937, that any of such funds would remain in the possession of the plaintiff. For the Attorney General to have raised the question at the time of the entry of the decree would, perhaps, have resulted in nothing more than delay and confusion in the adoption of the plan proposed. What reason would have moved a court at that time to consider a question, the relevancy of which could not be ascertained until three years later? We apprehend that an appeal from that decree, raising the question as to the rights which the state might have after the expiration of the three year period, would have received scant consideration in an appellate tribunal."

The same point was made in *Colley* v. *Wolcott*, 187 Fed. 595, at 597 (C.C.A. 8, 1911), where the court referred to the prior order which there purported to allow attorneys' fees:

> "It was, therefore, not such a final determination of the matter as amounted to an adjudication from which an appeal would lie before the final decree was entered in the case. Something was left to be done before the order could be executed."

In the present cause nearly two years of litigation remained to be completed after entry of the stay order before paragraph 6 could be executed. Similarly an appeal would not lie from paragraph 6 of the order, because it was impossible for an appeal then to settle the question of rights to a nonexistent unclaimed balance.

There was not, nor could there have been, in June, 1956, an issue regarding any rights in the now unclaimed fares. Appellees, therefore, cannot assert the doctrine of *res judicata* respecting their rights to receive attorneys' fees from the unclaimed fares. Their arguments must rest solely on estoppel by the bare consent of appellant to the order as a whole.

B. Appellant Is Not Estopped by Its Consent to the Order of June 18, 1956, to Assert Its Right to the Unclaimed Fares.

Where there has been no adjudication of a matter, any agreement relating thereto, although it be incorporated in an agreed order, does not estop subsequent judicial inquiry into the merits of the matter. Appellant so contends on the basis of the following authority.

In *U. S.* v. *International Building Co.*, 345 U.S. 502, 73 S.Ct. 807, 97 L.ed. 1182 (1953), a tax deficiency had been assessed against appellee on the ground it had claimed

an excessive depreciation basis during 1933, 1938 and 1939. In the Tax Court proceedings a stipulation specified there were no deficiencies for the taxable years in question, and the assessments were abated. Judgment was entered thereupon although no hearings were held, no stipulations of fact were entered, and no briefs were filed or arguments heard. Similar deficiencies were assessed thereafter for other taxable years. The company sued for their recovery asserting that the prior judgment pursuant to the stipulation was *res judicata* to the question raised in the later suit. This Court held through Mr. Justice Douglas, at 345 U.S. 505-506, 97 L.ed. 1188:

> "We conclude that the decisions entered by the Tax Court for the years 1933, 1938, and 1939 were only a *pro forma* acceptance by the Tax Court of an agreement between the parties to settle their controversy for reasons undisclosed. There is no showing either in the record or by extrinsic evidence (see *Russell* v. *Place*, 94 U. S. 606, 608) that the issues raised by the pleadings were submitted to the Tax Court for determination or determined by that court. They may or may not have been agreed upon by the parties. Perhaps, as the Court of Appeals inferred, the parties did agree on the basis for depreciation. Perhaps the settlement was made for a different reason, for some exigency arising out of the bankruptcy proceeding. As the case reaches us, we are unable to tell whether the agreement of the parties was based on the merits or on some collateral consideration. Certainly the judgments entered are *res judicata* of the tax claims for the years 1933, 1938 and 1939, whether or not the basis of the agreements on which they rest reached the merits. But unless we can say that they were an adjudication of the merits, the doctrine of estoppel by judgment would serve an unjust cause: it would become a device by which a decision not shown to be on the merits would

> forever foreclose inquiry into the merits. Estoppel by judgment includes matters in a second proceeding which were actually presented and determined in an earlier suit. See *Commissioner* v. *Sunnen, supra,* at 598. A judgment entered with the consent of the parties may involve a determination of questions of fact and law by the court. But unless a showing is made that that was the case, the judgment has no greater dignity, so far as collateral estoppel is concerned, than any judgment entered only as a compromise of the parties."

Thus, consent to an order does not constitute collateral estoppel against later litigation of an issue which has not been judicially determined on its merits. In the case at bar, the district court's acceptance of the agreed order did not constitute an adjudication on the merits of appellees' rights to attorneys' fees.

Trapp v. *United States,* 177 F.2d 1 (C.C.A. 10, 1949), is also similar. It was a suit to recover income tax deficiencies paid under protest. In 1940 Trapp had treated income from oil and gas leases as community income, but the Commissioner of Internal Revenue redetermined it to be income of the taxpayer. The complaint alleged an estoppel by judgment in that the Board of Tax Appeals had determined in 1935 that income from Trapp's leases constituted community income. The court, at 177 F.2d 5, described the prior proceeding as follows:

> "The record before us fails to indicate that an answer was filed in the proceeding or that any issue of fact or law was otherwise joined. Negotiations between the parties were had and the deficiency was calculated according to the contentions of the taxpayer. But there was no trial, and no stipulation of facts was filed. The parties stipulated in writing that there was a deficiency due in a specified amount and that decision might be rendered accordingly. But the

> stipulation did not set forth any of the basic facts on which that conclusion was based. Reciting that it was entered pursuant to the written stipulation of the parties, decision was entered for the agreed amount. A judgment, not predicated upon stipulated facts, or upon findings of fact, or upon a determination on the merits, but merely to carry out a compromise agreement of the parties, fails to constitute an effective judicial determination of any litigated right. Fruehauf Trailer Co. v. Gilmore, 10 Cir., 167 F. 2d 324. And a decision of that kind rendered by the Tax Court will not support a plea of estoppel in a case of this nature involving liability for income tax for a different year."

This Court denied certiorari. *Trapp* v. *United States*, 339 U.S. 913, 70 S.Ct. 573, 94 L.ed. 1339 (1950).

Still another decision of the same tenor is *Lawler* v. *National Screen Service*, 349 U.S. 322, 75 S.Ct. 865, 99 L.ed. 1122 (1955). This was a suit for treble damages for violation of the federal anti-trust laws. A prior suit for a similar violation had been settled prior to trial. At 349 U.S. 324, 99 L.ed. 1125-1126, this court stated:

> "In 1943, prior to any trial, the suit was settled. The basis of the settlement was an agreement by National Screen to furnish the plaintiffs with all standard accessories distributed by National Screen pursuant to its exclusive license agreements with producers, including exclusive license agreements which might be executed in the future. In exchange, the plaintiffs agreed that they would withdraw the suit and that they would pay National Screen for the materials at specified prices. Pursuant to the settlement, the suit was dismissed 'with prejudice' by court order. No findings of fact or law were made."

The court of appeals in the decision below, *Lawler* v. *National Screen Service Corp.*, 211 F.2d 934, at 935 (U.S.C.A. 3, 1954), stated:

> "No question of collateral estoppel by the former judgment is involved because the case was never tried and there was not, therefore, such finding of fact which will preclude the parties to that litigation from questioning the finding thereafter."

Although this Court reversed on other grounds, Mr. Chief Justice Warren stated, at 349 U.S. 327, 99 L.ed. 1127:

> "It is of course true that the 1943 judgment dismissing the previous suit 'with prejudice' bars a later suit on the same cause of action. It is likewise true that the judgment was unaccompanied by findings and hence did not bind the parties on any issue—such as the legality of the exclusive license agreements or their effect on petitioners' business—which might arise in connection with another cause of action. To this extent we are in accord with the decision below."

On the basis of the above authority, appellant contends that its consent to the order of June 18, 1956, is not decisive of the question of rights in the unclaimed fund. The provisions of paragraph 6 of that order were never judicially determined. The status of the ownership of the unclaimed fares, therefore, is as if paragraph 6 had been omitted from the order of June 18, 1956.

Lawrence M'f'g Co. v. *Janesville Mills,* 138 U.S. 552, 11 S.Ct. 402, 34 L.ed. 1005 (1891), was an action seeking to enforce a consent decree entered pursuant to an agreement between the parties in a suit to enjoin defendant's use of the trademark "LL". The agreement provided that defendant and its successors and assigns would not use the trademark in consideration of plaintiff's discontinuance of the suit and release of damage claims. The consent decree, however, did not in terms enjoin defendant's successors and assigns, and when appellee succeeded to defendant's interest in the business, it proceeded to use the trademark. The Lawrence Company then brought

suit to have the incomplete decree "pieced out" and enforced against appellee. The lower court refused to do so and dismissed the bill.

On appeal, this Court referred to *Lawrence M'f'g Co. v. Tennessee M'f'g Co.*, 138 U.S. 537, 11 S.Ct. 396, 34 L.ed. 997 (1891), an entirely separate proceeding against a different defendant, which established that the Lawrence Company was not entitled to the exclusive right to use the trademark "LL". In the *Janesville* case, this Court held at 138 U.S. 560, 34 L.ed. 1008, that:

> ". . . that decision is controlling here so far as those questions can be considered as involved."

Mr. Chief Justice Fuller, at 138 U.S. 561, 34 L.ed. 1008-1009, then considered the effect of the consent which underlay the former decree:

> "But where a party returns to a court of chancery to obtain its aid in executing a former decree, it is at the risk of opening up such decree as respects the relief to be granted on the new bill. Hence, even if it be assumed upon the evidence that the decree against the old corporation bound the new one, yet this being in effect, in one of the two aspects, and, perhaps, the sole aspect, in which it is framed, a bill to carry the former consent decree into execution, the Circuit Court was not obliged to do so if it believed that decree erroneous; and that it was erroneous we have already decided. Inasmuch as plaintiff came into a court of equity to have the benefit of the former decree, the court was at liberty to inquire whether circumstances justified the relief. Mitf. Ch. Pl. 96. Indeed, it would seem to have devolved upon it to show that the decree was a right decree."

At page 562 of 138 U.S., 1009 of 34 L.ed., the decision stated the reason for such treatment of the consent:

> "As, therefore, if the old company had defended the suit against it, it would have prevailed, the decree of the Circuit Court, being correct upon the merits, is also correct in that the court refused to be constrained by the previous erroneous consent decree, to decree contrary to the right of the cause."

Thus, the basic question before this Court in the *Janesville* case is the same question raised by the instant appeal: whether consent to an order estops a party from contesting a provision thereof when such provision is contrary to law. In this appeal, as stated in appellant's Jurisdictional Statement, pages 8-12, the allowance of attorneys' fees from the unclaimed fares is contrary to the rule of *Atlantic Coast Line* v. *Florida*, 295 U.S. 301, 55 S.Ct. 713, 79 L.ed. 1451 (1935); *Inland Steel Co.* v. *U.S.*, 306 U.S. 153, 59 S.Ct. 415, 83 L.ed. 557 (1939); and *United States* v. *Morgan*, 307 U.S. 183, 59 S.Ct. 795, 83 L.ed. 1211 (1939), and contrary, also, to the rule of *Trustees* v. *Greenough*, 105 U.S. 527, 26 L.ed. 1157 (1882), and *Sprague* v. *Ticonic Bank*, 307 U.S. 161, 59 S.Ct. 777, 83 L.ed. 1184 (1939).

Paragraph 6 of the order of June 18, 1956, is not self-executing and, in any event, must come again under the scrutiny of a court to become effective. It is immaterial whether this be done by a petition for the allowance of attorneys' fees as contemplated by the decision of the district court, *State* v. *United States*, 168 F.Supp. 706, at 708 (D.C.N.D. Ill., 1958), or whether by motion of appellant as in *United States* v. *Morgan*, 307 U.S. 183, 59 S.Ct. 795, 83 L.ed. 1211 (1939). In the instant case, as in the *Janesville* decision, a court's duty to inquire into the merits of the rights under paragraph 6 upon such an occasion is not excused by the consent originally accorded the order as a whole.

The appeal at bar is taken to rectify the error of the lower court and to obtain an adjudication of whether appellant's right to the unclaimed fares is superior to appellees' rights to attorneys' fees therefrom. Appellant seeks, not merely a review of such a determination already had in the cause, as appellees contend, but an original declaration of ownership in such fund. Appellant seeks its first "day in court" on the issues raised hereby.

III.

The Proceedings in February, 1958, Do Not Foreclose Appellant's Right to the Unclaimed Fares.

A. Appellee Association Relies on the Doctrine of Collateral Estoppel.

Appellee Commuters' Association contends, at pages 10-12 of its Motion to Affirm, that the issues raised by this appeal were adjudicated by the proceedings had in this cause before the district court in February, 1958. It cites no authority for such assertions. Neither does it expressly invoke the familiar principles of *res judicata* or collateral estoppel, although it appears to rely upon the latter. This Court stated in *Commissioner* v. *Sunnen*, 333 U.S. 591, at 598, 68 S.Ct. 715, 92 L.ed. 898, at 906 (1948):

> "Once a party has fought out a matter in litigation with the other party, he cannot later renew that duel. In this sense, *res judicata* is usually and more accurately referred to as estoppel by judgment, or collateral estoppel."

The essence of appellee's argument is that the duel over ownership of the presently unclaimed fares has already been fought and resolved adversely to appellant by the district court's order of February 28, 1958.

In *Yates* v. *United States*, 354 U.S. 298, at 336, 77 S.Ct. 1064, 1 L.ed. 2d 1356, at 1385 (1957), this Court summarized the doctrine of collateral estoppel as follows:

"That doctrine makes conclusive in subsequent proceedings only determinations of fact, and mixed fact and law, that were essential to the decision."

Cromwell v. *County of Sac*, 94 U.S. 351, 24 L.ed. 195 (1877), was an action on four bonds and coupons in which the county's defense was estoppel by a prior judgment in its favor in a suit brought by a different party on earlier maturing coupons of the same bonds. The judgment in the prior suit was based upon fraud and the fact that plaintiff was not a *bona fide* holder in due course and for value. In the second suit the plaintiff was clearly a holder in due course. This Court distinguished estoppel by judgment precluding later litigation of the same claims from estoppel upon a different claim. At 94 U.S. 352-353, 24 L.ed. 197-198, the opinion stated:

"In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. . . .

"But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

In the case at bar, therefore, the first inquiry must be whether the questions litigated in the proceedings of February, 1958, are the same as those raised by this appeal.

B. Facts and Issues Presented By This Appeal Were Not Resolved By the Order of February 28, 1958.

Paragraph 4 of the order of June 18, 1956, provided:

> "If the decree is affirmed or the appeal is dismissed or discontinued, the Milwaukee Road shall post immediately in its suburban stations, notice that refund will be made of the excess fares to the persons who have paid them."

That order did not contemplate a decision of this Court on grounds requiring remand of the cause for further proceedings before the Commission. What the parties contemplated in June, 1956, was an outright affirmance or reversal on appeal of the lower court's decree on the grounds expressed in its 1956 opinion. *State of Illinois* v. *United States*, 146 F.Supp. 195 (D.C.N.D. Ill., 1956). See Jurisdictional Statement, pages 5-6. That did not occur; this Court held on appeal:

> ". . . we do not think that the deficit from this single commuter operation can fairly be adjudged to work an undue discrimination against the Milwaukee Road's interstate operations without findings which take the deficit into account in the light of the carrier's other intrastate revenues from Illinois traffic, freight and passenger." *Chicago, M., St. P. & P. R. Co.* v. *Illinois*, 355 U.S. 300, at 307-308, 78 S.Ct. 304, 2 L.ed. 2d 292, at 299 (1958).

Thus, the basis for the remand by this Court was entirely unrelated to the basis upon which the lower court had set aside the Commission's order in *Chicago Intrastate Suburban Fares, Milwaukee Railroad*, 297 I.C.C. 353 (1955).

This Court's remand of the cause, consequently, was unexpected and unforeseen by the parties. The order of June 18, 1956, did not provide for disposition of the impounded funds in such event, and left a void which appellant sought to fill by delaying any action under the stay order until the final decision it contemplated should be accomplished by a later order of the Commission.

Appellant's motion of February 10, 1958, requested the district court to:

> " . . . further stay the injunction prescribed by its decree entered June 14, 1956, and to order said defendant to continue the impounding of fares, as is now being done . . ."

Contrary to the statement of appellee Commuters' Association, at page 10 of its Motion to Affirm, appellant's motion did not seek relief from the obligation imposed by the stay order. Appellant did not seek thereby to reverse the terms of that order so that refunds never would have to be made; it did not seek to obtain the impounded fund. Appellant desired only a continuation of the status quo until the proceedings on remand could be completed.

Appellant's motion in the lower court for a stay or supersedeas pending appeal of the order of February 28, 1958, requested merely:

> " . . . a stay of the time for compliance with the injunction prescribed by decree of this Court entered June 14, 1956 and with the provisions of its order of June 18, 1956 insofar as said decree and order require immediate refund of impounded monies heretofore collected pursuant to order of the Interstate Commerce Commission."

At no time during the proceedings in February, 1958, was there mentioned the subject of appellees' rights to attorneys' fees under paragraph 6 of the order of June

18, 1956. The subject matter of the present litigation, the unclaimed fares, did not come into existence until the end of the refunding period on August 28, 1958.

In its brief opposing appellant's motion of February 10, 1958, appellee Association mentioned only those parts of the stay order relating to refunds of the impounded fares to those who paid them. Its concluding statement, pages 33-34, was:

> "We submit that the Milwaukee Road's motion should be denied, and that it should be directed to comply with the decree of this Court enjoining it from charging the increased fares specified in the invalid order of the ICC and to take immediate steps to refund the impounded funds as required by the stay order of June 18, 1958."

What appellee Association sought in opposing appellant's said motion was, not an allowance of attorneys' fees, but the refund of the impounded monies to the suburban passengers.

At pages 4-5 of its brief opposing appellant's request to this Court for supersedeas, *Chicago, M., St. P. & P. R. Co.* v. *Illinois*, 356 U.S. 906, 78 S.Ct. 665, 2 L.ed. 2d 573 (1958), the Association again discussed the order of June 18, 1956, without mentioning the provision concerning reasonable expenses of the parties. There again, the Association concerned itself only with the question whether refunds should be made to suburban riders. The concluding paragraph of that brief states, at page 27:

> "The obligation of the Milwaukee Road to refund the impounded excess fares held by it as trustee or escrow agent, is clear and must be complied with. There is no basis for issuance of a supersedeas or stay order that will relieve the Milwaukee Road from immediate compliance with that obligation."

Thus the only question which was considered in February, 1958, was that of immediate refunds of fares to the persons who paid them.

Nor is appellee Association aided by the fact that the appeal from the district court's order of February 28, 1958, was not prosecuted to a final conclusion. Appellant dismissed its appeal to this Court from the order of February 28, 1958, because a successful appeal would have been a hollow victory. The impounded fares became immediately available to proper claimants. Had this Court eventually reversed the order, the monies already would have been disbursed. To recapture them from individual claimants would have been impossible. The subject matter of the litigation would not have been in existence at the time the appeal was decided. Thus, after the denial of appellant's petition for a stay or supersedeas, the appeal was moot.

C. Appellees May Not Rely on the February, 1958, Litigation to Deny Appellant's Right To the Unclaimed Fares.

The estoppel asserted by appellee Association does not extend beyond the issue at bar in February, 1958. As this Court stated in *Cromwell* v. *County of Sac*, 94 U.S. 351, at 354, 24 L.ed. 195, at 198 (1877):

> "These cases, usually cited in support of the doctrine that the determination of a question directly involved in one action is conclusive as to that question in a second suit between the same parties upon a different cause of action, negative the proposition that the estoppel can extend beyond the point actually litigated and determined."

Thus, the present question of ownership of the *unclaimed* excess fares was not determined by the proceedings in February, 1958.

That the present issues properly might have been raised and adjudicated in those proceedings is immaterial. This point was also mentioned in the *Cromwell* case, at page 356 of 94 U.S., 199 of 24 L.ed.:

> "It is not believed that there are any cases going to the extent that because in the prior action a different question from that actually determined might have arisen and been litigated, therefore such possible question is to be considered as excluded from consideration in a second action between the same parties on a different demand, although loose remarks looking in that direction may be found in some opinions. On principle, a point not in litigation in one action cannot be received as conclusively settled in any subsequent action upon a different cause, because it might have been determined in the first action.
>
> "Various considerations, other than the actual merits, may govern a party in bringing forward grounds of recovery or defence in one action, which may not exist in another action upon a different demand, such as the smallness of the amount or the value of the property in controversy, the difficulty of obtaining the necessary evidence, the expense of the litigation, and his own situation at the time. A party acting upon considerations like these ought not to be precluded from contesting in a subsequent action other demands arising out of the same transaction."

Therefore, regardless of the prior judicial determination that the order of June 18, 1956, required *refunds* to be made, the fact that appellees' attorneys' fees and appellant's rights in the unclaimed fund were not raised in February, 1958, leaves them open for adjudication on this appeal.

Following the *Cromwell* case, this Court held that where new or changed circumstances not present in an earlier

action constitute a defence, the first judgment does not estop their assertion in a later suit. *Nesbit* v. *Riverside Independent District,* 144 U.S. 610, 12 S.Ct. 746, 36 L.ed. 562 (1892). Also an action on bonds, this case involved a defense in the prior suit that certain recitals in the bonds prohibited a showing by the municipality that they were an overissue under the state constitution. The second suit was on other bonds of the same issue in which was proved the additional fact that the municipality had constructive notice of the overissue. This Court stated at 144 U.S. 620, 36 L.ed. 566:

> "The effect of recitals is one thing; that of recitals coupled with notice is another. The one question was litigated and determined in the Des Moines suit; the other is presented here. Surely an adjudication as to the effect of one fact alone does not preclude in the second suit an inquiry and determination as to the effect of that fact in conjunction with others."

Similarly, in the instant appeal, the estoppel asserted by appellees is precluded because there are now involved additional facts previously unknown, namely, that the fund is now, but previously was not, unclaimed and that the Commission's findings of October 31, 1958, theretofore non-existent, again justified increased fares. The questions here are new and different from those considered in February, 1958.

The decisions just quoted were reaffirmed by this Court in *Commissioner* v. *Sunnen,* 333 U.S. 591, 68 S.Ct. 715, 92 L.ed. 898 (1948). The question in this case was whether income during the years 1937-1941 from certain royalties which Sunnen had assigned to his wife was taxable as income to him. In an earlier proceeding the Tax Court concluded that Sunnen was not taxable on royalties paid to his wife during the years 1929-1931. Citing the *Cromwell* decision, this Court held, at 33 U.S. 597-598, 92 L.ed. 906:

> "But where the second action between the same parties is upon a different cause or demand, the principle of *res judicata* is applied much more narrowly. In this situation, the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but 'only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.'"

This decision suggested the basis for collateral estoppel, at page 599 of 333 U.S., 907 of 92 L.ed.:

> "That principle is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally. It is not meant to create vested rights in decisions that have become obsolete or erroneous with time, thereby causing inequities among taxpayers."

Appellees thus may not create a vested right to receive attorneys' fees from the unclaimed fund by reliance on the obsolete proceedings of more than a year ago.

A similar tax case is *Stanback* v. *Robertson*, 183 F.2d 889, (C.C.A. 4, 1950), *certiorari denied*, 340 U.S. 904, 71 S.Ct. 280, 95 L.ed. 654 (1950). This suit was to recover income taxes allegedly assessed wrongfully against a family partnership for the year 1941. The question before the court of appeals was the validity of the partnership for tax purposes. A prior proceeding in the Tax Court had involved the same parties and partnership agreement, but it dealt with the question of tax liability for the years 1938 and 1939. In that prior determination, no question was raised as to the validity of the partnership arrangement. Citing the *Cromwell* and *Sunnen* decisions, the Court held at 183 F. 2d 894:

> "The Tax Court in the Stanback cases was concerned only (as was the Supreme Court in the Clifford case) with the question of the allocation of income for tax purposes and never commented on the question of the validity of the partnership for tax purposes, the fundamental issue in the case now before us. As we have already pointed out, collateral estoppel can be invoked only where the same issue has actually been previously litigated. Here the precise issue before us has not been previously adjudicated. . . ."

In this case, likewise, no question was raised in the litigation of February, 1958, concerning appellees' rights to attorneys' fees. The parties' rights in the unclaimed fares were not then before the court, and those proceedings do not estop appellant to request that they be decided without reference thereto and on the merits.

IV.

The Findings of the Interstate Commerce Commission on October 31, 1958, Remain in Full Effect; the Doctrine of Atlantic Coast Line v. Florida Applies.

Appellee Association argues that the "order" entered by the Interstate Commerce Commission on October 31, 1958, pursuant to *Chicago Intrastate Suburban Fares of Milwaukee Road,* 305 I.C.C. 73 (1958), See Appendix C, Jurisdictional Statement, pages 21a-22a, has no present effect. Brief for Appellee 7-8, 13. This statement is not correct. Appellant's petition for increased fares has not been stricken; the proceedings before the Interstate Commerce Commission were not discontinued; the report and findings of the Interstate Commerce Commission still remain a matter of record; and the identical fares ordered by the Commission are now in effect.

The vacation order is set out herein as Appendix A, page 1a, *infra*, and merely reflects the policy of the Interstate Commerce Commission, based on principles of comity, to allow a state to regain jurisdiction over intrastate fares which, unlike appellant's previous suburban fares, are not in violation of federal law.

The decisive fact which appellee overlooks is that the recent vacation order left in effect the report of the Interstate Commerce Commission, including its findings. Appendix C, page 17a-18a, Jurisdictional Statement. Under the doctrines expressed in *Atlantic Coast Line* v. *Florida*, 295 U.S. 301, 55 S.Ct. 713, 79 L.ed. 1451 (1935), and *United States* v. *Morgan*, 307 U.S. 183, 59 S.Ct. 795, 83 L.ed. 1211 (1939), it is the findings of the Commission on remand which are controlling and upon which appellant bases its right to receive the present unclaimed fares.

A. Atlantic Coast Line v. Florida.

That no impounded fund was involved in the *Atlantic Coast Line* case does not distinguish it from the instant litigation. This Court contrasted the third *Morgan* case with *Tank Car Corp.* v. *Terminal Co.*, 308 U.S. 422, 60 S.Ct. 325, 84 L.ed. 361 (1940), in *Addition* v. *Holly Hill Co.*, 322 U.S. 607, at 621, 64 S.Ct. 1215, 88 L.ed. 1488, at 1498 (1944), where the opinion stated:

> "If it be said that in the *Morgan* case the Court was dealing with a fund in court—irrelevant though that be to the governing principles of that decision—no such constriction can be made of the import of our decision in *General American Tank Car Corp.* v. *Terminal Co.* . . ."

Both of these cases were suits to recover sums allegedly due the respective claimants.

The instant case is merely the obverse of the *Atlantic Coast Line* case. Here the excess charges are claimed by

a railroad; there, by a railroad's patrons. In neither case does the impounding of the excess charges or the absence thereof affect the "color of right" obtained by their collection. *cf. United States* v. *Morgan*, 307 U.S. 183, 59 S.Ct. 795, 83 L.ed. 1211 (1939).

B. United States v. Morgan.

Appellee Association strives to evade the application of the doctrine of the *Morgan* case by suggesting differences where none exist. It attempts to distinguish the third *Morgan* case as turning on the meaning and application of the provisions of the Packers and Stockyards Act which, it says, differs materially from the Interstate Commerce Act. Apparently the Association failed to take the precaution of comparing Section 310 of the Packers and Stockyards Act under which the Secretary acted, with Section 15 of the Interstate Commerce Act which authorized the Commission to prescribe the fares in the present proceeding. It would have found, had it done so, that the language of the first mentioned section is to be found nearly word for word in the latter.

The Packers and Stockyards Act, Section 310, 42 Stat. 166, 7 U.S.C. Sec. 211, provides:

> "Whenever after full hearing upon a complaint made as provided in section 210 of this title, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—

"(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter in such case observed as both the maximum and minimum to be charged, and what regulation or practice is or will be just, reasonable, and non-discriminatory to be thereafter followed; and

"(b) May make an order that such owner or operator (1) shall cease and desist from such violation to the extent to which the Secretary finds that it does or will exist; (2) shall not thereafter publish, demand, or collect any rate or charge for the furnishing of stockyard services more or less than the rate or charge so prescribed; and (3) shall conform to and observe the regulation or practice so prescribed."

Section 15 (1) of the Interstate Commerce Act, 54 Stat. 911, 49 U.S.C. Section 15 (1), provides:

"Whenever, after full hearing, upon a complaint made as provided in section 13 of this title, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property, as defined in section 1 of this title, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable indi-

vidual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation of practice so prescribed."

Further, Section 316 of the Packers and Stockyards Act, 42 Stat. 168, 7 U.S.C. Sec. 217, states that for the purpose of certain sections of the act under which the Secretary exercised his powers:

". . . the provisions of all laws relating to the suspending or restraining the enforcement, operation, or execution of, or the setting aside in whole or in part the orders of the Interstate Commerce Commission, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of said sections, and to any person subject to the provisions of said sections."

C. The October 31, 1958, Findings of the Interstate Commerce Commission Here Involve No Objectionable Retroactive Effect.

In the *Atlantic Coast Line, Inland Steel,* and *Morgan* cases, the fact that later determinations governed the disposition of funds collected beforehand was not fatal to the equitable rights so confirmed. If the application of such authority to the present issues constitutes retroactivity, it

does so in a special, limited, unoffensive sense of the word. That it does no injustice to the law is apparent from this Court's decision in *Addison* v. *Holly Hill Co.*, 322 U.S. 607, at 622, 64 S.Ct. 1215, 88 L.ed. 1488, at 1498 (1944):

> "The petition for rehearing claimed that our decision involved retroactivity. 309 U.S. 694. So it did. But as against retroactivity we balanced the considerations that made retroactivity seem the lesser evil."

The *Addison* case was a suit brought under the Fair Labor Standards Act, 52 Stat. 1060, 29 U.S.C. Sec. 201 *et seq.*, by employees of the company against their employer for wages. Liability depended in part upon whether a definition of the administrator had created an exemption from the Act by virtue of the number of workers employed. This Court remanded the cause with instructions to continue it until the administrator could make a valid determination of the geographical area in which the exemption was effective. The argument advanced against this disposition was that such a subsequent determination of the administrator, in a suit involving private parties only, would constitute retroactivity. At 322 U.S. 620, 88 L.ed. 1497-1498, the decision stated:

> "The accommodation that we are making assumes, what we must assume, that the Administrator will retrospectively act as conscientiously within the bounds of the power given him by Congress as he would have done initially had he limited himself to his authority. To be sure this will be a retrospective judgment, and law should avoid retroactivity as much as possible. But other possible dispositions likewise involve retroactivity, with the added mischief of producing a result contrary to the statutory design."

The *Addison* case expressly points out the retroactive effect of the decisions in the *Atlantic Coast Line, Inland*

Steel and *Morgan* cases. It cites them with approval and follows them in disposing of the issues there at bar. We urge that such retroactivity as is here present is not fatal to appellant's contention that the second order of the Commission has confirmed its "color of right" to the unclaimed excess fares acquired by its collection of them under the first order.

In the fourth *Morgan* case, *United States* v. *Morgan*, 313 U.S. 409, 61 S. Ct. 999, 85 L. ed. 1429 (1941), the market agencies made the same contention as does the Association in the instant case, that the Secretary could make no retroactive order. This Court said, at 313 U.S. 416, 85 L.ed. 1432:

> "He neither purported to make nor did he make a *nunc pro tunc* order. The Secretary thus adopted a procedure which admitted whatever light was shed by change of circumstances after 1933. The market agencies freely availed themselves of this procedure; and the Secretary's findings leave no room for doubt that his conclusions represent a judgment of 1939 and not a prophecy of 1933."

Retroactivity within the scope of the cited decisions is not fatal when it assists in determining the equities of a situation. Those decisions apply in this appeal to confirm appellant's rights in the unclaimed fares.

CONCLUSION.

On the authorities cited at pages 4 to 11 hereof this Court has jurisdiction of the present direct appeal. Appellant, therefore, requests this Court to deny the Motion to Dismiss of appellees, the State of Illinois and Illinois Commerce Commission.

On the foregoing arguments and authorities, appellant contends that the provisions of the lower court's order of June 18, 1956, and the litigation of February, 1958, do not render the issues raised on this appeal manifestly unsubstantial. Appellees obtained no rights to the present unclaimed fares by the order of June 18, 1956, and no such right could have been affirmed by the proceedings in February, 1958. Consideration of the questions on this appeal on their merits, therefore, is not foreclosed by prior proceedings in this cause. The questions raised hereby consequently are substantial, as stated in appellant's Jurisdiction Statement, pages 8 to 12.

Appellant requests this Court to deny the motions of appellees to affirm the order of December 24, 1958. Appellant further requests this Court to note probable jurisdiction of this cause and order that it shall stand for argument on the merits of the questions presented.

Respectfully submitted,

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888 Union Station Building
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May 12, 1959

APPENDIX A.

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D.C., on the 20th day of March, A. D., 1959.

No. 31742

CHICAGO INTRASTATE SUBURBAN FARES OF MILWAUKEE RAILROAD

No. 11703

IN THE MATTER OF INTRASTATE RATES WITHIN STATE OF ILLINOIS

It appearing, That on October 31, 1958, the Commission issued its report and order on further hearing in this proceeding, requiring, under a finding of unjust discrimination against and undue burden on interstate commerce, certain increased intrastate fares to be established and maintained on and after February 6, 1959, and modified its outstanding orders in No. 11703 *Intrastate Rates Within Illinois,* 59 I.C.C. 350, so as to permit this to be done;

It further appearing, That on December 8, 1958, protestants filed a petition for reconsideration, and that on December 29, 1958, respondent filed a reply to protestants' petition;

It further appearing, That on December 10, 1958, respondent filed schedules establishing such increased fares with the Illinois Commerce Commission, and that on January 8, 1959, that Commission approved such fares and they are now in effect;

It further appearing, That on January 14, 1959, certain protestants filed a motion to vacate as moot our order of October 31, 1958, and to dismiss respondent's original petition upon which this investigation was instituted, and that on February 3, 1959, respondent filed a reply to the motion;

And it further appearing, That there is no error in fact or law in said report and order of October 31, 1958, but that there is no necessity for an affirmative order in this proceeding so long as these increased fares continue in effect, and that, as a matter of comity, said order should be vacated in the respects indicated below:

It is ordered, That our order of October 31, 1958, be, and it is hereby, vacated and set aside, except insofar as it modifies the said outstanding orders in No. 11703, Intrastate Rates in Illinois, 59 I.C.C. 350; that the said petition of December 8, 1958, be denied and that said motion of January 14, 1959, be overruled in all other respects.

By the Commission.

Harold D. McCoy
Secretary

(Seal)